In the Supreme Court of the United States

October Term, 1979

No. 79-1241

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

ASHLAND OIL, INC.,
Petitioner,

vs.

PHILLIPS PETROLEUM COMPANY, and
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Ashland Oil, Inc. prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on October 15, 1979.

OPINIONS BELOW

The opinion of the court of appeals (A. 1a) is reported in 607 F.2d 335, and that of the District Court for the Northern District of Oklahoma (A. 62a) is reported in 463 F.Supp. 619. These opinions followed proceedings on remand from the rehearing *en banc* opinion of the court of appeals

(A. 8a) reported in 554 F.2d 381, cert. denied, 434 U.S. 921, 968, which had affirmed in part, and remanded limited issues, on review of the district court's first opinion (A. 99a) reported in 364 F.Supp. 6. These opinions, together with an unreported court of appeals opinion (A. 43a) superseded by the *en banc* opinion on rehearing, are separately appended hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit (A. 4a) was entered on October 15, 1979. Ashland's timely petition for rehearing was denied on November 14, 1979 (A. 6a). Jurisdiction of this Court is invoked under 28 U.S.C §1254(1).

QUESTIONS PRESENTED

1. The doctrine of law of the case embodies an important legal policy, akin to *stare decisis*, which prevents unfairness to parties and assists in controlling the length and expense of litigation by preventing the relitigation, in the same case, of issues already decided on appeal. Over a century ago, this Court held the law-of-the-case doctrine controlling in federal court litigation, but ambiguities have since developed.

This petition for certiorari presents the following questions:

(a) Does the federal doctrine of the law of the case preclude relitigation of the principal valuation factor for helium taken by the United States as part of a massive federal helium conservation program during 1963-1972, when that valuation factor had been rejected by the court of appeals on a rehearing *en banc* in an earlier appeal, following which no intervening change in law or fact had occurred?

(b) Is the party which prevailed on an issue on appeal, as to which a petition for certiorari was denied, thereafter entitled to rely upon that decision in the future conduct of the litigation?

2. Should post-judgment interest under 28 U.S.C. §1961 commence to accrue from the time of entry of the original judgment for plaintiff, notwithstanding the amount to which plaintiff is entitled is ordered to be recalculated according to objective data by an appellate court, resulting in a revised amount for which judgment is later entered?

STATUTE INVOLVED

28 U.S.C. §1961, 62 Stat. 957, pertinent to Question No. 2, provides:

> "Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case, where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law."

STATEMENT OF THE CASE

This action, invoking jurisdiction by reason of diversity of citizenship under 28 U.S.C. §1332, was brought by Ashland against Phillips in 1967 to recover for the value of Ashland's helium contained in natural gas delivered to Phillips, the helium having been extracted by Phillips and delivered to the United States for conservation under a

long-term contract made in 1961. The action was an offshoot of massive class action cases, pending since 1963, in federal court in Kansas involving large quantities of helium similarly extracted and delivered to the United States by three other companies having long-term conservation contracts with the government. The helium was produced from thousands of gas wells located in Kansas, Oklahoma, and Texas.

In an earlier appeal (A. 8a), the court of appeals had made a specific decision disapproving a valuation theory asserted by respondents, had affirmed Ashland's right to recover, and had remanded the case on other issues. On remand, however, the district court adopted the valuation theory disapproved on appeal (A. 62a). Ashland appealed, relying on the federal doctrine of the law of the case which precludes relitigation of issues decided on a prior appeal. The court of appeals, affirming (A. 1a), also declined to apply the law of the case, and gave no consideration to the fact that Ashland, in relying on the federal doctrine in district court, had not tried its case on the theory that the valuation factor was any longer open to relitigation.

The court of appeals also declined to award Ashland interest on its judgment, under 28 U.S.C. §1961, from the time of its earlier 1973 judgment, thereby following a line of decisions which is in conflict with the contrary rule in other circuits.

The decision below evolved from the following background.

In *Northern Natural Gas Company v. Grounds, et al.*, 441 F.2d 704 (10th Cir. 1971), cert. denied, 404 U.S. 951, 1063, the classes of gas producers and landowners owning royalty interests in the Kansas litigation, were held en-

titled to recover the value of their helium.[1] Those cases were remanded for a determination of that value.

Thereafter, the United States intervened in this action as a party. Trial was conducted in 1973 in the District Court for the Northern District of Oklahoma. The essential controversy was how to value helium commingled in natural gas prior to its extraction and delivery to the government.

The United States intervened because contingency price escalation provisions in the helium conservation contracts with Phillips (RI, Pls. Ex. 5, Vol. I), and other helium extractors, required the United States to pay an additional amount, above an $11.00 per m.c.f. average base price fixed in the contract, to the extent that Phillips was required to pay third parties (such as Ashland) above approximately $3.00 per m.c.f. (thousand cubic feet) for obtaining the helium to be extracted and conserved. The United States thus contended that Ashland's recovery should be a "nominal amount" not exceeding $3.00 per m.c.f.

Ashland's evidence in 1973 included all pertinent government and Phillips documents, demonstrating that no "market value" as such existed for its helium prior to extraction. Thus, Ashland contended that an alternative valuation method commonly used in the gas industry

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1. Helium is a rare, noncombustible gas with unique qualities making it indispensable for numerous industrial, technological and governmental purposes. Its only commercial source is from minute quantities commingled in natural gas in limited areas, over 95% being in the area involved in the *Northern* litigation. Its depletion in this decade will require extraction from presently non-commercial sources at costs up to $350 per m.c.f. (RI, Pls. Ex. 57, Vol. VI), as contrasted with market prices during the 1960's of only $20.00 per m.c.f. This situation dictated the massive conservation program as described in the *Northern* case.

Citations "RI" and "RII" will be to the printed appendices in the first and second appeals, respectively.

should be utilized to value its helium. This was the market value of extracted product, less the expense of extraction method, otherwise referred to as the "work-back" method. When a commodity, such as butane, or helium, is extracted from a gas stream in which it is commingled, the extracted product which is then competitively marketable for the first time as a commercial product, has a known market value. To accurately arrive at the value prior to the extraction, one need only deduct from the known value of the marketable product, the expenses of extraction including a fair return to the extractor.

Phillips and the United States, on the other hand, first contended that several special transactions were sufficiently comparable to prove commingled helium value in this case, and that these supported a value ranging from $1.16 to $3.00 per m.c.f. But they further contended that if the work-back valuation method were to be utilized, the Court should not use the value of helium being marketed as helium in a free market (about $20.00 per m.c.f.), as the starting point from which to subtract extraction expenses, but should rather use as the starting point the base contract price averaging $11.00 per m.c.f. as contained in the government conservation contract. This, of course, would have resulted, if accepted, in a much lower recovery than by using the current market price of helium as the starting point.

In its 1973 decision, the district court held that the transactions relied on by respondents were not comparable, and adopted the work-back method. The court then rejected the use of the base contract price as a starting point in the method because that base price did not reflect a market value but was a specially constructed contract, containing the contingency price escalation clause for additional third party payments, which enabled the United

States "to obtain a base price substantially lower than would otherwise have been possible." *Ashland Oil, Inc. v. Phillips Petroleum Company*, 364 F.Supp. 6, 9 (A. 105a). It found that the prices for helium sold on the private market ranged from $35.00 to $20.00 per m.c.f., and thus found that the starting value in the method should be $20.00 per m.c.f. (A. 104a), and awarded judgment accordingly, deducting extraction and purification expenses from that figure.[2]

On appeal, Phillips and the United States renewed their contention that the starting point in the work-back method should be the base contract price. They further contended that Ashland had not presented sufficient evidence of specific sales of marketable helium in the open market to support the $20.00 price utilized by the district court.

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2. The finding that the base contract price was not representative of "market value" was supported by all the historical documentation of the contract negotiations, in which the parties recognized that "no real market value for helium in natural gas has ever been established", and that the third party price escalation provisions in the contracts were "absolutely necessary" because otherwise "if these provisions were deleted the price of helium to the United States would be much higher or, it may not be possible to enter into a contract. . . ." (RI, Pls. Ex. 39, Vol. III).

This statement by the government negotiator was made concerning the first conservation contract with Northern Helex Company, which was the prototype for the later contracts, including the Phillips contract. All helium extractors ultimately insisted on that provision before execution of the contracts (Grounds I, Vol. V, p. 1531, LPX 182). In obtaining a low base price, the government also complied with 41 C.F.R. §§1-3.403-2 and 1-15.205-7 (1961), pertaining to contingent price escalation provisions, which *required* that the base contract price not include any amount for the contingency which may later require additional price payments.

Northern Helex consultants assisting in the contract pricing recognized at the time that the base price was at least $4.00 to $5.00 per m.c.f. below fair market value (RI, Ex. Vol. III, p. 688). Northern's base contract price was $11.24 as compared to Phillips' $10.30 per m.c.f., these averaging about $12.00 and $11.00 respectively, during 1963-1972, due to commodity index adjustment provisions.

In the January, 1975, decision by the court of appeals, respondents' contentions were rejected, and the valuation portion of the judgment was affirmed (A. 43a).

In the meantime, in late 1974 the Kansas district court in the *Grounds* class action cases, on remand after reversal on the liability issue, had rejected valuation of helium by the work-back method (393 F.Supp. 949), from which judgment the representative producers and royalty owners had appealed. To resolve the inconsistency, the court of appeals ordered a hearing on those appeals before the full court, *en banc,* to be consolidated with a rehearing *en banc* which it granted to respondents in this Ashland case.

After complete presentation to the appellate court in November, 1976, on a consolidated evidentiary record (A. 60a), in which the question whether the base contract prices should be utilized as the starting point in the valuation method was extensively argued (Tr. of arguments, pp. 10, 33-34, 44-45, 65, 82), the *en banc* decision in this case was entered in May, 1977, approving the work-back method. *Ashland Oil, Inc. v. Phillips Petroleum Company,* 554 F.2d 381 (A. 8a). The five-judge majority flatly rejected use of the base contract price as a valuation factor, but, in view of respondents' assertions that the $20.00 starting value utilized by the district court was not supported by evidence of specific sales of helium in the marketplace, remanded for further evidence on the selling price of such helium (A. 21a) (554 F.2d at 388). After complete analysis of respondents' contentions, the court held:

> ". . . The value here sought to be established is independent of the contract base amount. . . ." (A. 23a) (554 F.2d at 389).

Since an additional cost to be incurred by the government to market the impure conservation helium, delivered

by Phillips for underground storage, was a $2.00 per m.c.f. purification cost, the court ordered this cost to be applied in deducting from the market value of pure, or marketable, helium (A. 20a, 21a, 30a) (554 F.2d at 388 and 392). Thus, the court noted the result of its holding was that "The United States is liable for some of the additional amounts which Phillips will have to pay", and that "The Government nevertheless obviously has the basic responsibility and liability. . . ." (A. 24a, 25a) (554 F.2d at 390).

The single dissent from the *en banc* decision disagreed with the majority's rejection of the base contract price as a starting point, and its approval of the price of pure, marketable helium as the starting point. The dissent argued for use of the base contract price as the starting point, which would result in "a price close to $3.00" (A. 36a) (554 F.2d at 395).[3]

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3. The dissent objected to a value above $3.00 per m.c.f., in part because the government was liable to pay the price above that amount, resulting in a cost to taxpayers (A. 41a) (554 F.2d at 397-398). The dissent exaggerated the amounts involved, although, with 20,000,000 m.c.f.'s involved in the total helium litigation, about $140 million remains in controversy, since the difference between using the contract base price, and the market price, of helium in the valuation method is about $7.00 per m.c.f., taking account of the $2.00 purification cost.

The dissent failed to recognize that the government will resell the conservation helium, and will recover all costs (50 U.S.C. §167d), achieving a multibillion dollar benefit because prices will be several times as high as the previously depressed $20 market price for helium upon depletion of the current cheap sources in the 1980's (RII, Pls. Ex. 2-19, Vol. I).

The dissent also failed to consider the legislative history of the Helium Act Amendments, 74 Stat. 918, 50 U.S.C. §§167a, et seq. The Interior Department sought to eliminate the language in §167(a)(2) requiring payment for helium "to be measured by terms and prices determined to be commensurate with the fair market value . . ." (RI, Pls. Ex. 53, Vol. IV, p. 829), because the Department wanted to obtain commingled helium for its past monopolistic price in noncomparable transactions, in the neighborhood of $2.00 to $3.00 per m.c.f. (Private industries did not

(Continued on following page)

Phillips and the United States then filed petitions for certiorari with this Court, recognizing the adverse decision against them on this point, and relying, in part, upon the dissent. The petitions were separately denied. 434 U.S. 921, 968 (1977) (Nos. 77-221; 77-530).

In the ensuing proceedings after remand, Ashland presented documented evidence of selling prices for helium in the open market indisputably supporting the prior $20.00 value as being accurate and conservative. The district court, however, over Ashland's objection, then allowed respondents to present several newly retained economists who were permitted to testify to conclusions that the base contract price should be utilized as the starting point in the work-back method. Ashland's case had been prepared and presented in complete reliance on the prior rejection of the base contract price as being relevant to valuation (RII, Vol. I, pp. 208-333).

After the trial, the district court, adopting most of respondents' requested findings verbatim, found that its first judgment was "erroneous" (A. 63a), that the base contract price should be utilized as the starting point, and that this resulted in a helium value of $3.00 per m.c.f. (A. 97a), as had been advocated by the dissent from the *en banc* opinion.

Footnote continued—

produce and sell helium until the 1960's, the government having a monopoly prior to that time).

Congress refused to delete the provision [50 U.S.C. §167a (a)(2)], making clear that payment for helium value was to inure to the benefit of those having interests in the helium, back to the initial royalty owners from whose lands the helium was produced (RI, Ex. Vol. IV, p. 827).

The only suggestion made to Congress for determining a value "commensurate with a fair market value" was to consider the value of helium after extraction and sale in a competitive market, in connection with the extraction costs (Hearing Before Subcommittee on Mines and Mining, pp. 38-39, 103, 105, March, 1960).

Ashland appealed that judgment, relying upon the law of the case as established in the earlier *en banc* decision.

A panel of the court of appeals handed down a *per curiam* opinion on October 15, 1979, summarily affirming the $3.00 value, and the use of the base contract price as the starting point in the valuation method, without discussion of Ashland's reliance on the law of the case doctrine, and without attempting to explain the obvious inconsistency with the 1977 *en banc* decision (A. 1a).

Ashland had also sought post-judgment interest under 28 U.S.C. §1961 on the revised amount of the judgment after remand, such interest to accrue on the revised amount from the date the original judgment had been awarded in 1973.

The district court rejected the contention, and the court of appeals affirmed (A. 3a) by citing *Hysell v. Iowa Public Service Co.*, 559 F.2d 468 (8th Cir.), thus following a rule in conflict with that of several other circuits.

REASONS FOR GRANTING THE WRIT

The two questions presented involve basic, constantly recurring problems of federal judicial management directly affecting the current propensity of litigants to take appeals, contributing to delay and expense in federal litigation. They are clearly defined issues which can be decided by review of the appellate and district court opinions issued between 1973 and 1979.

One question pertains to the court of appeals' failure to apply this Court's federal doctrine of the law of the case, and the failure to consider the juridical impact of a party's reliance on an appellate decision in connection

with further proceedings on remand. This element of reliance is of crucial importance in federal jurisprudence of the law of the case, which has not been, but should be, settled by this Court.

The other question, of post-judgment interest under 28 U.S.C. §1961, presents an unresolved conflict among the circuits which has increasingly led to inconsistent results and great confusion, during a time when the view adopted below motivates defendants to continue litigation after adverse judgment in order to profit from the use of money owed to a prevailing plaintiff.

This case also assumes additional importance because it arose from massive class action cases which remain pending without decision in the court of appeals since arguments were presented in 1976, involving the rights of tens of thousands of citizens, and many millions of dollars.

I. This Court Should Decide an Important, Recurring Question—Is a Party Entitled to Rely on the Law of the Case Decided on Appeal, in Subsequent District Court Proceedings?

As generally stated, the law of the case precludes relitigation of an issue decided on appeal, either by the district court,[4] or by the appellate court in a later appeal in the same case,[5] unless an intervening change in law or

4. *Sibbald v. The United States*, 37 U.S. (12 Pet.) 488, 492 (1838); *Vendo Co. v. Lekto-Vend Corp.*, 434 U.S. 424 (1978); *Illinois ex rel. Hunt v. Illinois C.R. Co.*, 184 U.S. 77, 93 (1902).

5. *Insurance Group Com. v. Denver & R.G.W.R. Co.*, 329 U.S. 607, 612 (1947). The doctrine is stronger that that of *stare decisis*, 1B *Moore's Federal Practice*, §0.404(1), p. 403, because a party's "burden should not be increased by a load he has already successfully shouldered." *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir.), cert. dism. 419 U.S. 987.

fact has occurred since the prior appeal.[6] Recently, some lower court decisions have broadly expanded those limited exceptions if the prior decision is considered "clearly erroneous and would work a manifest injustice",[7] without providing any guideline limiting an otherwise unfettered discretion.[8]

One such indispensable guideline, we submit, should be the juridical element of reliance by a prevailing party on a piror decision in the same case, an element ignored by the court below.

Specifically, the issue arises because of this Court's rule that a district court has no authority to deviate from

6. *Messinger v. Anderson*, 225 U.S. 436, 443-444 (1912); *Commissioner of Internal Revenue v. Netcher*, 143 F.2d 484, 486 (7th Cir.), cert. denied, 323 U.S. 759; *Johnson v. Cadillac Motor Car Co.*, 261 Fed. 878 (2nd Cir.). Commenting on the latter case as being a tendency to subordinate precedent to "justice", Cardozo observed:

> "How to reconcile that tendency . . . with the need of uniformity and certainty, is one of the great problems confronting the lawyers and judges of our day." Cardozo, "Nature of the Judicial Process", from *Selected Writings of Cardozo*, p. 175 (Matthew Bender, 1947).

7. E.g., *White v. Murtha*, 377 F.2d 428, 432 (5th Cir.); *Ottey v. Stonewall Ins. Co.*, 538 F.2d 210, 212 (8th Cir.); 40 *West's Federal Practice Digest 2nd*, Federal Courts §950.

8. The difference between shaping the law to meet current conditions is much different than "destruction of all rules and the substitution in every instance of the individual sense of justice, the *arbitrium boni viri*." "That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law." Cardozo, "Nature of the Judicial Process", from *Selected Writings of Cardozo*, pp. 162-163 (Matthew Bender, 1947).

Even Blackstone observed that to allow a judge to vary from the law of a case according to his "private sentiments" would "make every judge a legislator, and introduce most infinite confusion. . . ." 1 *Chitty's Blackstone*, pp. 42, 46 (1832).

Allowing re-examination of questions decided on a first appeal by the same court "would lead to endless litigation." *United States v. Camou*, 184 U.S. 572, 574 (1902); *Illinois ex rel. Hunt v. Illinois C.R. Co.*, 184 U.S. 77 (1902).

an appellate mandate, followed since *Sibbald v. The United States,* 12 Pet. 488, 492 (1838). If a prevailing party then relies upon the mandate, and declines to relitigate an issue already determined, in remanded proceedings; but the district court allows the other party to present more evidence on the issue, and then decides that issue differently based upon a "one-sided" record, what is the result? Not only is this Court's doctrine of the law of the case ignored by permitting relitigation—but it is ignored based upon a record in which the issue is not fully and fairly litigated in the second trial. Unless an appellate court then corrects this error by applying the law of the case decided in the prior appeal, the doctrine itself becomes an instrument of entrapment depriving the party relying on it of a fair trial. And if a party cannot rely on the doctrine, it becomes meaningless.

There are, of course, rare instances in which reliance may not be a factor, where an intervening change in governing law has not caused a prevailing party to rely to his prejudice in further proceedings. But where, as here, reliance is a factor, any court must weigh the effect of this reliance before it can possibly conclude that the law of the case can be ignored.

In *Richles v. Margolies,* 279 U.S. 218 (1929), this question of reliance as it relates to the law of the case was implicit in the lower court proceedings, but was not addressed by the Court. As a consequence, an important element of the doctrine has been left undecided, contributing to confusion and a serious weakening of this concept of finality in federal litigation.

This recurring problem is discussed by Professor Moore in connection with *Richle v. Margolies,* 279 U.S. 218 (1929). 1B *Moore's Federal Practice,* §0.404(3), pp. 432 et seq. *Richle,* a federal receivership suit, was preceded by three

appeals to the Second Circuit. The first decision,[9] held that any judgment obtained by a claimant in federal court, to be obtained in an existing state court action, would not be binding on the receiver. *In reliance on that decision, the receiver made no appearance at the state court wherein the claimant obtained a default judgment.*

In the second appeal,[10] the circuit court held the default judgment conclusive, and remanded, without considering the effect of the receiver's reliance on the first decision. In the third appeal, the Second Circuit held that the second decision was the law of the case, and declined to re-examine it.[11] This Court granted certiorari, but considered only the merits, and affirmed. As noted by Professor Moore:

> "The Supreme Court, like the Court of Appeals, did not consider the factor of reliance upon the mandate which went down on the first appeal. Thus the policy behind the law of the case was completely perverted in this litigation." 1B *Moore's Federal Practice,* §0.404(3), p. 435.

In other words, if a party justifiably relies to his prejudice upon an appellate decision in further district court proceedings, he will be effectively deprived of a fair trial if the courts decline to apply the law of the case on which reliance was based. The inevitable result must be a "perversion" of the doctrine.[12]

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9. *Hatch v. Morosco Holding Co.,* 5 F.2d 1015 (2nd Cir.).

10. 19 F.2d 766.

11. 26 F.2d 247.

12. The factor of reliance also is more significant when the decision relied on is made after trial and appeal. Pre-trial rulings may more easily be altered than after full trial and appeal, because possible prejudice from reliance is minimal. 1B *Moore's Federal Practice,* §0.404(4), and cases cited. In our

(Continued on following page)

In this case, the court of appeals *en banc* definitively ruled in 1977, after two sets of briefings and oral arguments, upon a complete record, that the valuation of Ashland's commingled helium must be determined "independent of the contract base amount . . ." (A. 23a) (554 F.2d at 389). Its analysis left no doubt of this conclusion, as further indicated in the single dissent, which argued for use of the base amount in the valuation process (A. 36a) (554 F.2d at 395).

After this Court declined to review that holding, 434 U.S. 921, 968 (1977), Ashland justifiably considered the issue settled (A. 119a). It limited its case in the remanded proceedings to providing documentation concerning the selling price of helium in the market in order to support the district court's use of the $20.00 per m.c.f. figure utilized in the first trial (RII, Vol. I, pp. 211, 216, 224-240), as directed by the remand of the *en banc* appellate opinion.[13]

The district court indicated apparent agreement with Ashland's position at the commencement of trial in 1978 (RII, Vol. I, p. 208), yet after Ashland's evidence, the court permitted respondents to present testimony (over the specific objections of Ashland) from several economists, who were allowed to give opinions that the base contract price should be used in the valuation process (RII, Vol. II,

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Footnote continued—

present case, there were two appellate proceedings following the 1973 district court judgment, culminating in an *en banc* decision on rehearing in 1977. This Court's denial of certiorari later that year may have had no technical impact lending further finality, but, again, it is an obvious factor increasing the right to reliance on the *en banc* decision. See, 1B *Moore's Federal Practice*, §0.404(5--1), pp. 471 et seq.

13. We exclude reference to evidence on minor cost issues, pertinent to the work-back method, remanded by the court of appeals, as irrelevant here.

pp. 405-447). Only after such testimony did the district court indicate that it might reconsider use of the base contract price (Trial Tr., Vol. VI, pp. 710-711). The documentary record in the 1973 trial apparently became submerged as ancient history in the face of polished speeches ignoring those facts, given by witnesses from the stand.[14]

The district court later found that its 1973 finding was "erroneous" and adopted the base contract price as the key valuation factor (A. 71a), which resulted in a $3.00 per m.c.f. value as advocated in the dissent from the *en banc* decision. On Ashland's appeal, the court of appeals did not attempt to analyze its 1977 decision that the valuation must be "independent of the contract base amount." It made no reference to the unquestioned fact that Ashland had placed total reliance on the 1977 decision in presenting evidence on the limited issues remanded (A. 119a). The court merely affirmed by stating:

". . . We see no objection to the use of the contract value for this purpose. It was a negotiated figure

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14. Complete documentation of the negotiations for the 1961 contract was introduced in the 1973 trial. No new evidence thus, was thereafter available in 1978.

Respondents, thus, rather than claiming they had newly discovered evidence, contended (contrary to their admissions in their prior petitions to this Court) that the court of appeals' remand to reconsider "the proper starting value" (A. 30a) was a general remand enabling the court to consider again the base contract price as a starting value. This ignored the specific rejection of the base contract price in the opinion (A. 23a), ignored the approved use of the $2.00 per m.c.f. purification cost to be incurred by the U.S. prior to marketing the conservation helium, in the work-back method (A. 20a, 21a, 30a), and ignored that the reconsideration was because of respondents' claims that the selling price of pure helium was inadequately documented, which was the only reason for the court's allowing them to reopen that limited issue (A. 21a).

A general statement of remand at the end of an opinion must be read in context with the holdings, for otherwise "it would contradict what had been already expressed in the body of the opinion." *Washington Sportservice, Inc. v. M. J. Uline Company*, 313 F.2d 889, 893 (D.C. Cir.), cert. denied, 375 U.S. 814.

arrived at by parties dealing at arm's length . . . ." (A. 2a).[15]

In so holding, the court of appeals failed to apply the federal doctrine of the law of the case, and failed to consider what should be a most crucial element of that doctrine, that of reliance and its impact in depriving Ashland of a fair trial, by allowing relitigation on favored terms to one party.

The very silence of the court on the main issue presented is revealing. It did not discuss the issue or attempt to square the two decisions, because it could not.[16] In neglecting to evaluate the effect of the district court's refusal to apply the law of the case,[17] it failed to recognize the impact of Ashland's reliance on the fairness of the district court evidentiary hearing on remand, i.e., that Ashland presented a case to prove the selling price of marketable helium in the competitive market, while respondents were

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15. The complete formal and informal documentation of the negotiations was presented by Ashland in evidence in the 1973 trial (RI, Ex. Vol. III). These, of course, showed the obvious fact that the base price was negotiated at arm's length, but also showed that the base price was much lower than market value because of the contingency price provisions, and other elements of the contract. (Footnote 2, supra).

16. In 1977 it ruled that the valuation must be "independent" of the base contract price. Now it approves a valuation totally dependent on and utilizing that price. In 1977 it ruled that the government's $2.00 per m.c.f. cost of purifying the impure helium delivered by Phillips for conservation should be deducted, in the valuation formula, from the selling price of helium in the market place. Now it approves a result which entirely ignores and does not carry out that requirement. In 1977, thus, it ruled that the United States was the principal party in interest because of its obligation to reimburse Phillips for the amount of the judgment for Ashland exceeding $3.00 per m.c.f., under its conservation contract price provision. Now it approves a result which exonerates the United States of any liability.

17. Although the district court had allowed respondents broad pretrial discovery, it did not finally rule that it would reconsider the relevancy of the base contract price until its opinion was entered months after the trial.

permitted to present a case retrying the question of the propriety of using the base contract price as a starting value in the valuation process. The inherent unfairness of the parties litigating two very different issues, because of Ashland's reliance on the *en banc* decision, was not so much as adverted to by the court of appeals.[18]

In its *per curiam* decision, the court below recognized that the district court's decision to utilize the base contract price as the key valuation element was based on "the expert testimony." (A. 2a). Yet, it failed to recognize that respondents were permitted to hire and present opinions from four new economists in their attempt to negate the prior rejection of the base price as being relevant; whereas, Ashland, in reliance on the prior holding, declined to reopen that subject and had not retained any new witnesses in that connection.[19]

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18. The court's refusal to discuss an important federal doctrine, Ashland's principal point on appeal, appears to us to be a departure from the accepted and usual course of judicial proceedings (Rule 19 of this Court), which would warrant an exercise of this Court's power of supervision. Since, however, the *per curiam* opinion, in context with the earlier *en banc* decision, necessarily discloses the decision of the panel not to apply the law of the case, nor to consider the crucial element of reliance implicit in it, as urged by Ashland, the issue is now clearly defined, and should be decided on its merits. Cf., *Thompson v. Maxwell Land Grant & R. Co.*, 168 U.S. 451, 456 (1897).

A lower court's interpretation of its mandate is not controlling in this Court. *Federal C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940).

19. Respondents hired four economists shortly before the 1978 trial who had no previous knowledge of the helium industry. Based on incomplete data, they opined that the base price was a market value suitable for use in the work-back valuation method.

Had Ashland not relied on the 1977 *en banc* decision, it would have rebutted this misinformation by calling on genuine helium experts, such as Dr. Charles Laverick, who have demonstrated the erroneous nature of the type of conclusions which respondents induced the district court to accept (A. 75a-95a) as the

(Continued on following page)

Since this case will be direct precedent in the related massive class action cases which remain pending in the court of appeals since argument in 1976, the court's failure to consider the factor of reliance will result in serious prejudice to the rights of more than 30,000 citizens who are members of the prevailing classes, and, in our view, will deprive them of a fair price for their helium "commensurate" with market value as intended by Congress, and of many millions of dollars to which they are entitled, unless the decision below is reviewed and reversed.

Even more significantly, the effect of the *per curiam* opinion is to erode and negate an important foundation of federal law at a time when finality, and an end to perpetual litigation, are more needed than ever. This foundation can now be strengthened by providing guidelines essential to this concept of finality in federal jurisprudence.

This Court should, accordingly, require the weighing by federal courts of the juridical factor of reliance in determining whether the "law of the case" should be applied to enforce a prior decision. It is an important element of federal law which has not been, but should be, decided by this Court.

Footnote continued—
basis for its holdings. (Hearings on Helium-Energy Act of 1979, H.R. 2620, Committee on Interstate and Foreign Commerce, Serial No. 96-60, pp. 105-164). Dr. Laverick assisted a National Science Foundation study which described the 1973 termination of the helium program, premised on this misleading data, as a "disaster, to put it mildly".

II. The Conflict Among the Circuits As to Whether Post-Judgment Interest Under 28 U.S.C. §1961 Should Accrue From the Time of the Original Judgment, or From the Time of a Later Revised Judgment Following Appellate Remand, Should Be Resolved by This Court Because It Is an Important, Constantly Recurring Problem, Which Has Not Yet Been Settled by This Court.

Over 30 years ago, in *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948), certiorari was granted to decide this question, presented under the terms of what was then 28 U.S.C. §811, the predecessor statute to 28 U.S.C. §1961, but the majority decided the case on other grounds.[20] Four justices would have decided the question because of its importance:

> "Since the Court does not decide that question, I reserve decision upon it. But I dissent from the refusal to decide it now. The question is of considerable importance for the proper and uniform administration of the statute; it is not entirely without difficulty; and the uncertainty as well as the conflict of decision should be ended. There is no good reason for permitting their indefinite continuance, to the perplexity of courts and counsel, and to an assured if unpredict-

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20. The majority in *Briggs* decided that silence of the mandate on the question of interest in the intervening appeal precluded any award of judgment interest calculated from the date of the original verdict of the jury in favor of plaintiff, and thus did not reach the instant question.

Briggs has been distinguished in those instances wherein a judgment was entered on the original jury verdict (as contrasted to *Briggs*, where it had not), and interest has been allowed, notwithstanding silence of the first appellate mandate remanding the case, on the amount of the new judgment calculated from the date of the original judgment. *Taylor v. Washington Terminal Company*, 308 F.Supp. 1152 (D. D.C.); *Fassbinder v. Pennsylvania Railroad Company*, 233 F.Supp. 574 (W.D. Penn.).

able amount of injustice to litigants." (Per Mr. Justice Rutledge, with whom Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy joined).

Since then, with the increase of litigation, the conflict and confusion have proliferated. See generally, "Interest on Judgments in Federal Courts", 64 *Yale L.J.* 1019, 1040-1047 (1955). Many of the conflicting district court decisions are not reported.

Representing the view contrary to that below is *Perkins v. Standard Oil Company of California,* 487 F.2d 672 (9th Cir.). Post-judgment interest under §1961 was held to accrue on the judgment amount entered after an appellate remand, from the time of the earlier, original judgment, though the revised amount was lower than the original judgment. In substance and effect, the original judgment was viewed as having been partially affirmed, so that interest should be computed from the date of its original entry.[21]

21. *Perkins* was not a diversity case, and thus did not decide whether state or federal law should determine the question presented in such a case (487 F.2d at 675). Although ours is a diversity jurisdiction case, the *en banc* decision properly held that the question of interest and other issues were governed by federal law under the *Clearfield Trust* doctrine (A. 23a-27a) (554 F.2d at 389-391). See, *Phillips Petroleum Co. v. Texaco,* 415 U.S. 125 (1974). Thus, state law is clearly not applicable here.

A few courts, without analysis, have read §1961 to permit application of state law in ordinary diversity cases, as noted in *Perkins,* 487 F.2d at 675. These fail to distinguish the substantive question of pre-judgment interest as a part of the damages awarded, from the question of post-judgment interest which is a procedural device to compensate for loss of use of money incident to delays inherent in the federal system due to appeals, or otherwise.

Section 1961 adopts only the interest rate fixed by state law. Therefore, it should remain within the exclusive province of federal law to determine the time of accrual of that rate, in order to best serve the interests of federal courts in enforcing payment of federal judgments in a uniform manner. Cf., *Hanna v. Plumer,* 380 U.S. 460 (1965); *Walker v. Armco Steel Corp.,* 592 F.2d 1133 (10th Cir.), cert. granted, ... U.S. ..... (1979), argued January 8, 1980. (No. 78-1862).

Alternatively, *Perkins,* held "that interest should run from the date of entry of the original judgment because that is the date on which the correct judgment should have been entered." (487 F.2d at 676).

In so holding, the Ninth Circuit declined to follow a contrary decision by the Seventh Circuit in *Harris v. Chicago Great Western R.,* 197 F.2d 829, recognizing that, although an important question, "the Supreme Court has so far declined to decide it." (487 F.2d at 674).

The Tenth Circuit, in the instant case, however, chose to follow *Hysell v. Iowa Public Service Co.,* 559 F.2d 468 (8th Cir.), which is to the contrary (A. 3a). In *Hysell,* the first appellate remand had "vacated" the original judgment for additional findings below, after which the district court ultimately entered judgment for the same amount. It held that post-judgment interest should accrue only from the time of the last judgment, not from the date of the original judgment.

The district court in *Premier Corp. v. Serrano,* 471 F.Supp. 444 (S.D. Florida, 1979), affirmed per curiam, 578 F.2d 566 (5th Cir.), cert. denied, 439 U.S. 1003, noting the absence of any decision by this Court on the issue, was forced to choose between these two lines of authority, that represented by *Hysell,* supra, and that represented by *Perkins,* supra. It found the *Perkins* case "more persuasive under the circumstances" and declined to follow *Hysell.*[22]

22. The Fifth and Sixth Circuits apply the rule espoused by the Ninth Circuit in *Perkins,* supra. *Louisiana and Arkansas Ry. Co. v. Pratt,* 142 F.2d 847, 849 (5th Cir.); *Givens v. Missouri-Kansas-Texas R. Co. of Texas,* 196 F.2d 905 (5th Cir.); *Woods Explor. Pro. Co., Inc. v. Aluminum Co. of Am.,* 509 F.2d 784 (5th Cir.), cert. denied, 423 U.S. 833; *Swartzbaugh Manufacturing Co. v. United States,* 289 F.2d 81, 85 (6th Cir.); *Petition of United States Steel Corporation,* 479 F.2d 489, 508 (6th Cir.), cert. denied, 414 U.S. 859.

(Continued on following page)

The *en banc* remand in 1977 by the court below affirmed the issue of liability, and affirmed the basic premises upon which the district court's 1973 judgment had been predicated. It remanded for reconsideration certain limited elements of the valuation formula which were dependent on objective factual data, and could result, at most, in a modification of the amount owing to Ashland. Thus the recitation that the original judgment was "set aside" for this purpose is wholly irrelevant. As noted in *Kneeland v. American Loan and Trust Co.*, 138 U.S. 509, at 511-512 (1891), equity regards the substance and not the form. "The rights of the parties are not to be sacrificed to the mere letter, and whether the language used was 'reversed', 'modified', or 'affirmed in part and reversed in part', is immaterial."[23]

Indeed, the *Kneeland* case, and *De La Rama v. De La Rama*, 241 U.S. 154, at 159 (1916), although not directly in point, approved awards of interest from the time of the original judgments which were reduced in later judgments as a result of appeals.

Footnote continued—

The Second and Seventh Circuits apply the rule espoused by the Eighth Circuit in *Hysell*, supra (followed by the Tenth Circuit in this case); *Chemical Bank & Trust Co. v. Prudence-Bonds Corp.*, 213 F.2d 443 (2nd Cir. Frank, Circuit Judge, dissenting), cert. denied, 348 U.S. 856; *Powers v. New York Central Railroad Company*, 251 F.2d 813, 818 (2nd Cir., Lumbard, Circuit Judge, dissenting); *Harris v. Chicago Great Western R.*, 197 F.2d 829 (7th Cir.).

23. It has been suggested that the "equity of the statute" doctrine formulated in *Louisiana & A.R. Co. v. Pratt*, 142 F.2d 847 (5th Cir.), which "would allow interest on the total amount of plaintiff's ultimate recovery for the interval from first to final judgment" is "eminently sound" because this is the judgment which should have been entered at the date the original judgment was in fact entered. It assures full compensation without confusing tests and thus "offers a uniform solution to problems which are currently being solved by district court clerks in a variety of conflicting ways." Note, 64 *Yale L.J.* 1019, at 1040-1048.

Two factors have gained importance in recent times, which emphasize the greater need for a decision by this Court on this point.

The first factor is that a party entitled to money and deprived of it during appellate proceedings, is losing 10% or more per year to inflation alone, as well as loss of interest on the money at current high rates.

The second factor is that the party who owes the money has the use of it during that same delay. If he can use the money, interest free, it is to his interest to continue litigation. It is a sad fact, of which lawyers are well aware, that many cases are appealed, and appealed again, because of this motivation. This results, not only in injustice to the party entitled to be paid, and in a windfall to defendant, but unjustifiably increases the litigation load of the courts.

Although Ashland will receive pre-judgment interest at 6% per annum, Phillips has had the use of money owed Ashland during a time of high inflation and high commercial interest rates during more than five years between the original 1973 judgment, and the revised 1978 judgment. The economic loss (and corresponding gain to Phillips) from those combined effects is nearly 50% of the total judgment (including pre-judgment interest) as of 1978, under the present holding. Almost half of this loss would be recouped by approving the judgment interest rule followed by the *Perkins* line of cases.[24]

Moreover, it must be remembered that in many cases pre-judgment interest is not awarded at all. In these, the question now posed assumes even more vital importance.

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24. The post-judgment interest rate in Oklahoma from 1973-1978 was 10% (12 O.S.A. §727), and is thus the rate adopted by 28 U.S.C. §1961.

The time is ripe for this Court to decide this increasingly widespread and recurring question in order to resolve the existing conflict and confusion in the federal system.[25]

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25. Some of the rampant confusion has resulted from failure to clarify the respective roles of 28 U.S.C., §1912, allowing discretionary award of "damages" for delay on appeals, and 28 U.S.C. §1961, which is a mandatory direction allowing interest on judgments. See discussion, 64 *Yale L.J.* 1019, at 1023 et seq. This problem has been exacerbated by the failure of the 5-4 majority in *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948), to do so, as discussed in the dissent, 334 U.S. at 307-313. (The predecessor to §1912 was then 28 U.S.C. §878). The majority opinion appears premised on this failure and is open to serious question. Note, "Interest on Verdicts and Judgments in State and Federal Courts", 38 *Notre Dame Lawyer* 58, at 70 (1962). Cf., *Perkins v. Standard Oil Co. of California*, 399 U.S. 222 (1970).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 8, 1980.

79-1241

Supreme Court, U. S.
FILED
FEB 11 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1979

No. .....

ASHLAND OIL, INC.,
Petitioner,

vs.

PHILLIPS PETROLEUM COMPANY, and UNITED STATES OF AMERICA,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 79-1009, 79-1096, 79-1108
(Consolidated)

ASHLAND OIL, INC.,
Plaintiff-Appellant,
Cross-Appellee,

v.

PHILLIPS PETROLEUM COMPANY,
Defendant-Appellee,
Cross-Appellant,

and

UNITED STATES OF AMERICA,
Intervenor-Appellee,
Cross-Appellant.

Appeals From The United States District Court For The Northern District Of Oklahoma
(D.C. # 67-C-238)

(Filed October 15, 1979)

Gerald Sawatzky, Wichita, Kansas (John M. Imel, Arloe W. Mayne, Lillian Williams, W. O. Strong III, and of counsel, Foulston, Siefkin, Powers & Eberhardt, Fulbright & Jaworski, and Moyers, Martin, Conway, Santee & Imel, on the brief), for Plaintiff-Appellant, Cross-Appellee.

Don L. Jemison, Bartlesville, Oklahoma, and L. K. Smith, of Boone, Ellison & Smith, Tulsa, Oklahoma (Kenneth Heady and C. J. Roberts, on the brief), for Defendant-Appellee, Cross-Appellant.

John E. Lindskold, Department of Justice, Washington, D.C., for Intervenor-Appellee, Cross-Appellant.

Before SETH, Chief Judge, BARRETT and DOYLE, Circuit Judges.

PER CURIAM.

This case was remanded for the development of additional facts relating to and to provide a basis for the valuation of the helium at the wellhead by the use of a work-back method. *See* Ashland Oil, Inc. v. Phillips Petroleum Company, 554 F.2d 381 (10th Cir.). The trial court was to determine a proper starting place and value for such method, the plant cost, return on investment, the costs chargeable to production of liquid hydrocarbons, and related facts.

On remand the trial court selected as a starting point the stated value of helium used in the contract between Phillips and the Government. For a brief description of the contract, see 554 F.2d at 384. This determination by the court was based on the expert testimony relating to pure helium values and other possible starting points for the valuation of helium. A starting place for the work-back method can be at any point in the production - processing - sale chain where a dollar figure can be established by reliable evidence, and which may be demonstrated to be a realistic value. We see no objection to the use of the contract value for this purpose. It was a negotiated figure arrived at by parties dealing at arm's length. There may have been other considerations involved, but on remand these do not appear to have been substantial enough to cast doubt for our purposes on the contract price. This figure was not greatly different from those used in the contracts for other extraction plants.

Using this figure the trial court made findings as to plant investment and rate of return. These factual determinations were made after a consideration of the testimony and are supported by the record. The appellant urges that there are factors which should not have been included in the plant cost figure or in the total "capital employed" upon which Phillips was entitled to compute a return. However, again this was a fact-finding element, and the result was supported by the record.

The parties are in essential agreement as to the costs to be allocated to the production of liquid hydrocarbons. The trial court's figure on this element must be accepted.

The rate of return is a departure from the figure used at the first trial, but this element was included in the remand and again is supported by the testimony of the several witnesses. It is within the fact-finding function of the district court. On the prior appeal we expressly approved the award of prejudgment interest. This factor was not in the remand and became the law of the case. Thus, as we previously held, plaintiff is entitled to prejudgment interest.

The plaintiff urges that postjudgment interest should commence upon the date of the first judgment and not at the end of the remand trial. However, we must hold under 28 U.S.C. § 1961, in view of the extent to which the case was reversed, "the judgment" for the purpose of interest was that entered by the trial court on remand. *See* Hysell v. Iowa Public Service Co., 559 F.2d 468 (8th Cir.).

The judgment is affirmed as to the three dollar value at wellhead for the helium, but is reversed as to prejudgment interest and remanded for the entry of a judgment to include such interest.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEPTEMBER TERM—October 15, 1979

Before Honorable Oliver Seth, Chief Judge, Honorable James E. Barrett and Honorable William E. Doyle, Circuit Judges

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Nos. 79-1009
79-1096
79-1108
(D.C. No. 67-C-238)

ASHLAND OIL, INC.,
Plaintiff-Appellant-
Cross-Appellee,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant-Appellee-
Cross-Appellant,

and

UNITED STATES OF AMERICA,
Intervenor-Appellee-
Cross-Appellant.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed as to the three dollar value at wellhead for the helium, but is reversed as to prejudgment interest. The cause is remanded to the United States District Court for the Northern District of Oklahoma for the entry of a judgment to include such interest.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

SEPTEMBER TERM—November 14, 1979

Before Honorable Oliver Seth, Chief Judge, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges

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Nos. 79-1009
79-1096
79-1108

ASHLAND OIL, INC.,
Plaintiff-Appellant-
Cross-Appellee,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant-Appellee-
Cross-Appellant,

and

UNITED STATES OF AMERICA,
Intervenor-Appellee-
Cross-Appellant.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellant, Ashland Oil, Inc., in the captioned causes.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Seth, Circuit Judges Barrett and Doyle, to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied. Circuit Judge Holloway did not participate in the consideration of the suggestion for rehearing en banc.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 73-1797, 73-1798, 73-1799

ASHLAND OIL, INC., *Appellee, Cross-Appellant,*

v.

PHILLIPS PETROLEUM COMPANY, *Appellant,*

v.

UNITED STATES OF AMERICA, *Intervenor-Appellant.*

Appeal From The United States District Court For The Northern District of Oklahoma
(D.C. # 67-C-238)

(Filed May 10, 1977)

ON REHEARING EN BANC

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Floyd L. France, Attorney, Department of Justice, Washington, D.C. (Peter R. Taft, Assistant Attorney General, Nathan G. Graham, United States Attorney, Hubert A. Marlow, Assistant United States Attorney, E. Edward Johnson, United States Attorney, Jon K. Sargent, Assistant United States Attorney, Edmund B. Clark, Dennis A. Dutterer, George R. Hyde, and Jacques B. Gelin, Attorneys, Department of Justice, with him on the Brief), for Intervenor-Appellant, United States of America.

Before LEWIS, Chief Judge, BREITENSTEIN, SETH, McWILLIAMS, BARRETT and DOYLE, Circuit Judges, sitting en banc.

SETH, Circuit Judge.

DOYLE, Circuit Judge, dissents. Dissenting opinion attached.

This action was brought to recover the reasonable value of helium intermixed with natural gas, extracted therefrom, and sold by the defendant Phillips to the United States. The plaintiff prevailed against the defendant and the Government as intervenor in the lower court, and they both appeal. Plaintiff also appeals, but only as to the ultimate division of the proceeds derived from the helium as ordered by the trial court.

The case was commenced in the Southern District of Texas, but transferred at defendant's request to the Northern District of Oklahoma. The complaint asserts jurisdiction based on diversity, and this ground was established. The Government intervened as plaintiff, but was realigned as a defendant.

The general description of the occurrence of helium, its characteristics, and how it became an issue is described in the several opinions hereinafter cited. It is, however,

necessary to describe the contractual relationship which existed between the defendant Phillips and the Bureau of Mines during the pertinent time period as it bears on the relationship with plaintiff.

The Helium Act (50 U.S.C. §§ 167 et seq.) was directed to the conservation of helium present in natural gas and which was being wasted by the use of the gas as fuel. It was determined that the best method to prevent this loss was to intercept the flow of helium-bearing natural gas after it had been gathered and where large volumes were being transported by pipeline to the fuel consumers, and to extract the helium therein intermingled. At these points the pipeline companies had possession of the gas stream.

The Bureau of Mines pursuant to the Helium Act entered into contracts with those in possession of the natural gas stream to purchase helium after it was extracted from the stream. The record shows that this decision to contract apparently was brought about by the inability of the Bureau to then ascertain the identity of the interest owners in the helium and to deal with them within any reasonable time. The Bureau indicates that there were some 30,000 landowners involved and several hundred lessee-producers of the gas. The production is from several states and the interest owners reside in many different states. By the contracts with the defendant and others the Bureau made possible the construction of extraction plants and soon came into possession of the helium so removed from the large gas stream. Waste of the helium was so prevented, and the purpose of the Helium Act was accomplished.

We are here concerned with the Government contract with defendant Phillips whereby the helium was physically acquired by the Government, but the ownership and

compensation problems were put off to another day. The Bureau thus used by this contract the advantageous position of one in possession; postponed the inevitable legal problems, and placed itself in the position of a defendant when the problems came before a court.

In the contract between the United States as buyer and the defendant as seller covering the purchase of helium, a specific amount was provided as compensation to defendant. The record shows that this figure was arrived at by comparison of the estimated cost to the Government had it built its own plant. No relationship of this figure to any then market values was developed in the record. This was a base price of $10.30 per Mcf and was subject to escalation under Paragraph 7.3. Paragraph 7.4 provided that in addition to such amount the buyer would pay to the seller the amounts ". . . that Seller shall pay subsequent to the date of this contract . . . to parties other than itself . . . for the acquisition of helium in the natural gas . . . or for any interest therein." It provided that such payments to qualify would have to be made with the consent of the buyer, and that "consent" included claims that ". . . have been judicially determined in favor of any claimants by any Federal Court or the highest appellate court of any state," and payments made in accordance with the findings, principles, and conclusions of such "judicial determination." Under the contract formula the defendant would pay the first $3.00 per Mcf to third parties and the Government would pay the rest. The result would be that the ultimate payment to the "owners" was to be so shared by defendant and the United States, with the United States providing an indemnification for required payments above the stated amount. There are other qualifications also.

It is obvious that this litigation wherein compensation is demanded by the interest owners of the helium was

contemplated and was provided for in the contract. It was apparent that some knotty legal problems would have to be met in order to determine who the interest owners were, and to decide whether or not they had already been compensated for the helium under the leases, the gas purchase contracts, or the Natural Gas Act. These postponed legal problems were in large part decided in the *Consolidated Helium Cases* (*Northern Natural Gas Co. v. Grounds,* 441 F.2d 704 (10th Cir.)), opinion by Judge Breitenstein. The basic legal relationships among the landowners, producers, and gas purchasers were there established, as was the relationship of the Natural Gas Act and the Helium Act. The controlling rules were set in the *Grounds* opinion, en banc consideration was denied, and the Supreme Court denied certiorari. 404 U.S. 951. We decline to reconsider *Grounds*. Further, in *Grounds* we held that ". . . the lessee-producers are entitled to the reasonable value of the contained helium." The problem of the amount of reasonable compensation, and who should pay, was not decided in *Grounds,* and was remanded to the trial court. The *Grounds* case is again before this court en banc and was consolidated for hearing with this case, but is not considered in this opinion.

When the matter of compensation is in issue we ar faced with a somewhat different aspect of the physical and legal journey helium makes from the natural gas well to the storage facilities of the Bureau of Mines than we have considered before. The possession and interception of the gas stream, the separation of the helium therefrom, and its delivery to the United States under the contract arrangement are all still important, but the relationship of the contracting parties to those who now have been determined to own interests in the helium, and, of course, the value of the helium are the center of focus.

The position of the United States as a party herein is somewhat unusual. It filed a motion to intervene as a party plaintiff with a "Complaint in Intervention of the United States" attached. This motion was granted. The Complaint of the Government stated that the court had jurisdiction under 28 U.S.C. § 1345, cited 28 U.S.C. § 2201, and recited the existence of the contract for the purchase of helium from Phillips, asserted that Phillips had delivered to the United States "large quantities of a helium-gas mixture" for which it had been paid "substantial sums of money." This complaint acknowledges that the plaintiff Ashland is seeking the "fair market value" of helium in the gas it sold to Phillips which was processed for helium, and the helium in turn sold to the United States under the contract referred to above. The Government further alleges that Ashland has already been paid for the helium content along with the hydrocarbons, and in any event the value of the helium content is "nominal." The complaint asserts that: "An actual controversy exists between the United States and Ashland as to whether payments between Phillips and Ashland for the gas as produced was payment for the helium content." The Government also asserts that it ". . . has a real and substantial interest in this litigation because of a provision in its contract with Phillips under which it may be under a duty to indemnify Phillips for additional payments . . . ." The Government prayed for a determination that Ashland had already been paid in full, and if not, that the fair market value of the helium was "nominal." Phillips and Ashland answered the Government's complaint. Ashland in its answer prayed for costs and general relief.

As the trial opened, the attorney for Phillips suggested that the United States be realigned as a party defendant. The court then said: "The Court will order that the style be changed to Ashland Oil and Refining Company, Plain-

tiff, versus Phillips Petroleum and United States of America as defendants." The findings recite that at the Government's request it was aligned as a defendant and was an intervenor. The United States participated in the trial, cross-examined witnesses, put on a witness of its own, objected to the plaintiff's findings, and submitted proposed findings. The judgment entered ran against Phillips only. The United States has fully participated in this appeal.

As indicated above, this action was brought by Ashland against the defendant Phillips to recover the reasonable *wellhead value of helium commingled with the FPC jurisdictional Gas,* but separated at defendant's plants constructed pursuant to the Helium Act and delivered as "conservation helium" to the Bureau of Mines. The suit was tried within the holding of Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.) (*The Consolidated Helium Cases,* or *Grounds*).

On this appeal Phillips devotes much of its brief and argument to contentions which were advanced in *Grounds,* there considered and rejected. It would serve no purpose to again consider these arguments. Instead it is sufficient to refer to the *Grounds* opinion for the disposition of these points.

It must be accepted that the "value" sought to be determined in this suit is basically a factual matter determined through the application of the appropriate legal doctrines. This is the value at the wellhead of the helium commingled with the natural gas there being produced.

The appellants here urge as a basic error by the trial court that it chose the wrong method in arriving at this "value." The trial court determined that there was no prevailing market value for the commingled helium, there was no free competitive market for this helium at the

wellhead. The court thus used a market value for the ultimate product less the cost of beneficiation of the helium-bearing gas. The defendants urge that the trial court had sufficient evidence before it of a "market value" of the commingled helium at the wellhead.

The defendants, on their "market value" theory, put on testimony and exhibits as to transactions concerning helium-bearing gas wherein a value was ascribed to the helium component. These described events covered a broad time span and a wide geographical distribution. They involved both governmental agencies and private parties.

The trial court, in holding that there was no free competitive market, held that these transactions were of no probative value because they were not comparable. It thus concluded that the evidence failed to establish a "market price" by comparable sales. We reach the same conclusion. The transactions described by the witnesses for the defendant were too remote in time or place, and otherwise could not be considered as comparable. The testimony did not show a free market condition to establish a usable price. It is apparent that the gas stream here concerned with all its components was directed by the FPC, and was locked in by the jurisdictional gas. There was not an opportunity for free pricing at any point, nor for renegotiation of sales or the negotiation with new purchases. The helium thus had to go along with the stream. The purchasers of the stream here concerned, of course, took the position that they owned the entire contents, and were not required to pay anything more. This litigation demonstrates the character of the market, the Government domination of the market, and the strength of bare possession.

In the market price evidence of the defendant, considerable detail is presented as to purchases at the several Government helium plants. These include the plants at Exell, Otis, Cunningham, and Navajo. The helium purchases or gas purchases at these plants were made during World War II. The years which have passed since "The War" would seem to cast more than a doubt that these could possibly be comparable sales. The purchases at the Navajo plant were renegotiated after the War in 1955 and 1959, but again this cannot be a comparable transaction. The stream from the Rattlesnake production had no use as a fuel. It did have a high helium content, but nothing is developed as to any other market for this gas. The Government had for all practical purposes a monopoly on sales of helium until about 1962.

There was also testimony as to purchases of gas by the Government for the Keyes plant in 1958. The price was somewhere near $2.00 per Mcf. The production costs at this plant were about $15.50 per Mcf. The basic interest of the seller was to make the residue gas marketable by raising the BTU. The seller also assumed liability for possible additional payments to third parties.

The Otis plant was also used to upgrade the gas for fuel purposes by separating out the noncombustible portions of the stream.

Phillips also introduced evidence as to several *contracts* it had made for the payment for components of the gas production purchased. Some mentioned helium, some did not. This was a dollar price in some, and a formula as for all other components in others. These are not of particular significance, especially the casinghead gas contracts, because there was no evidence that the casinghead gas contained helium nor was ever processed for helium. As to the other Phillips contracts,

there was no showing that the gas had a helium content at all (with insignificant exceptions), nor that there was ever a remote possibility of extraction, again with insignificant exceptions. Contractual provisions in such a context, even where helium was mentioned, are a meaningless gesture of the parties, and cannot be considered as evidence of comparable *sales*.

The Gas Sales Agreement between Colorado Interstate and Alamo Chemical Company (a Phillips affiliate or subsidiary) was put in evidence. This provided for the processing of gas produced in Morton County, Kansas, for the removal of helium and liquefiable hydrocarbons. The plant operator was to pay $2.00 per Mcf for helium extracted at the plant. This price was not negotiated, and it seems reasonable to assume that this was because there was litigation pending as to the obligations to pay for helium involving the parties. The contract limited the sellers' liability on the title warranty of helium to $2.00 per Mcf. There was no contract provision for payment for hydrocarbons removed. This contract must be considered for all practical purposes as a post-litigation contract. There was also in evidence a gas exchange agreement between Phillips and Pioneer Natural Gas Company. This had a price for helium but there were other contractual considerations such as delivery of gas at other locations, and payment for only part of the helium. This agreement cannot be considered as a comparable sale.

The testimony of the defendants and evidence was thus directed to "other sales" in other places and other times. There was no substantial showing that these were "comparable sales." Evidence of "other sales" falls far short of establishing a market without comparability being clearly established.

In addition to the evidence relating to particular contract provisions, and some sales, there was expert testimony. The plaintiffs and defendants had expert witnesses who testified as to what the value of helium should be. This testimony produced by both sides is of theoretical interest, presents a facet of the entire conservation program, and a description of the few independent private enterprises which tried to enter the field. No matter how interesting, this evidence is only opinion evidence, and does not establish facts. This testimony comes well down on the scale of acceptable evidence as to value. It is obvious that comparable sales or current market price is the best, and second would come the work-back method. The expert testimony of the type here presented would come somewhere after that. The experts were extremely capable, experienced persons who gave well considered and conscientious expression of their opinions, but nevertheless it remained opinion evidence on a matter of objective facts.

We thus must agree that the trial court was correct in seeking an alternative method to "market price" for establishing the reasonable value of the helium component at the wellhead. It is obvious that the comparable sales-current market price is by far the preferable method when it can be used. However, it cannot be used when the elements necessary for its proper application are lacking. The trial court thus had to resort to a work-back method or price less costs of beneficiation. This was a less desirable method but perfectly valid. Under this method a point was selected where there can be determined an established price and the cost of processing or beneficiation were deducted to move back to the place where the value must be established.

The work-back valuation is well recognized in the production and early processing of natural gas. It is com-

monly used, according to this record, in placing a value on feed stock for gasoline plants and related processing. There is nothing unusual about the method, it is subject to proof, and can be just as accurate as any other method, but it is more difficult to apply. There is here concerned a single plant constructed and operated for the specific purpose of extracting helium. Other costs, and other elements, can be established. This work-back method was used by the Government and the Court of Claims in making payment to the Navajos for gas supplied to the Navajo Helium Plant. *See Navajo Tribe v. United States,* 364 F.2d 320 (Ct.Cls.). The Government has used it on other occasions such as for Kerr-McGee royalty payment in Arizona, and under different circumstances. As to the work-back as a method for valuation, *see also* Brown, Law of Oil and Gas Leases, § 6.09; *Harding v. Cameron,* 220 F.Supp. 466 (W.D.Okl.); and Sneed, 25 Tax L. Rev. 641. This method to establish value has not only been used in the petroleum industry, but also in other natural resources cases. *See United States v. Wyoming,* 331 U.S. 440; *Black Crystal Coal Co. v. Garland Coal & Mining Co.,* 267 F.2d 569 (10th Cir.); and *Greer v. Stanolind Oil & Gas Co.,* 200 F.2d 920 (10th Cir.). *See also* the gasoline plant case, *Freeland v. Sun Oil Co.,* 277 F.2d 154 (5th Cir.), which is a common use in the industry.

Phillips argues that its right to acquire the helium component was covered by its contracts, and neither the Helium Act nor the Natural Gas Act altered these contracts. Thus there was a Fifth Amendment violation if its property was "given" to another. This court on the *Grounds* case really decided this issue and there would seem to be no need to consider it again other than to state that Phillips acquired the whole stream or production, but has only paid for part. We said in *Grounds,* "In our opinion private contract law and the principles appli-

cable thereto are not controlling." Apparently the Government has yet to pay Phillips for much of it also.

The appellant next argues that the value less expense method was not only inapplicable, but it was improperly applied in that the proof was deficient as to certain elements, that mistakes were made, and that "trifling recognition" was given to certain evidence. We will take these references to mean that there was not substantial evidence on the several factors or elements of the method of valuation.

As to the several elements, the appellants urge that the amount used as the "return on investment" expense was not sufficient. The trial court used a figure which was part of the testimony of plaintiff's witnesses, and the method by which it was arrived at was so presented. There was no substantial contrary evidence presented at trial although on appeal appellants assert deficiencies in the method. This element however was not adequately developed by the proof and further hearing is required on this element.

The appellants also object to the allowance made by the trial court of $2.00 per Mcf for the "treatment" of the "crude" helium sold to it by Phillips (to be incurred by the Government before resale), as insufficient in that it did not include transportation and storage. Matters of expense to be incurred subsequent to the delivery and perhaps some transportation from place of delivery to the underground storage are not shown to have been omitted from the $2.00 figure although it was denominated a "treatment" or "processing" cost. In any event, these costs are more properly attributable to the general conservation program as the duration of the storage and additional transportation are unknown factors under the record. The

use of the deduction was proper and appellants have not shown that it was not supported by substantial evidence.

The trial court used a figure of $20.00 per Mcf for the selling price of helium, and this was the starting figure or element of the value less expense method. This figure was testified to by the witness for the plaintiffs; this price issue was not met by defendant by way of proof. On remand the validity of this figure must be examined by the trial court, and a determination made again as to the proper starting value.

The Government, in an argument again based on condemnation doctrine, urges that the helium values were *created* by its own purchase program—The Helium Conservation Program, and it should not have to pay for such values. It cites several condemnation cases on this point, and *United States v. Fuller,* 409 U.S. 488, which in turn cited *United States v. Cors,* 337 U.S. 325. This again concerned payment for something requisitioned by the Government. The issue here is the determination of value of a commodity which was purchased and sold by the Government and by private concerns. It was a stockpiling of a commercial product. This cannot be equated to the cases where the condemnation or the reason for condemnation increases the value of the land taken. The helium has value by reason of its nature and usefulness. The Government may have made this helium available but did not create its value.

The appellants vigorously attack the use by the trial court of the value of hydrocarbon liquids produced at the helium plants in the value less expense calculations. The trial court allocated part of the plant expense to these liquids as by-products. The evidence is unclear that an increase in the production of liquids would result from the helium plant operation over what had been experienced

before and over ordinary extraction plants. Appellants maintained that the increase in liquid production did not result at all from the treatment of the gas stream for helium extractions. The record shows that increased quantities of wet gas were directed to at least one of the plants, and this could make a difference in the production of liquids, but no figures were produced by defendants. Under this state of the record, we must hold that the trial court did not have adequate data to this element. Different quantities of liquids were produced at different plants, and this may result in different helium values at different plants. In view of the evidence, this was a consequence of the application of the expense element in the formula. However, further evidence on this aspect is needed.

The Government makes the point that the value of helium at the wellhead determined by the trial court exceeds the base figure for the helium-nitrogen mixture it was buying from Phillips under its contract. This may be a consequence of the decision, but there is no reason why the wellhead price should be determined by the contract price. This payment was not necessarily the "price" of the helium as other considerations were present. The contract between the appellants was negotiated between them alone, and the pricing was the evaluation by them of the entire economic consequences of the transaction including many significant factors such as its duration, warranties, and indemnities. We have described the contract at the outset of this opinion. Attention should however be directed again to the evaluations made of the legal questions, especially the title questions. Government agreed basically to pay Phillips for its interest in the helium and then to pay more if other interest owners established their claims. This has been done, but

the price "paid" for all the interests in the helium has not yet been determined. The value here sought to be established is independent of the contract base amount, and is to be of all interests of the proper parties.

We have considered *Lippert v. Angle,* 211 Kan. 695, 508 P.2d 920. It states the traditional preference for comparable sales proof with which we agree, but the case does not involve the separate valuation of helium. The plant was very small, and the situation is not comparable in any way. *See also Greenshields v. Warren Petroleum Corp.,* 248 F.2d 61 (10th Cir.).

This appeal also raises issues as to the allowance of prejudgment interest, attorney fees, and the matter of limitations. The trial court tried the case as a federal question case, relying on our opinion in *Texaco Inc. v. Phillips Petroleum Co.,* 481 F.2d 70 (10th Cir.), which was thereafter reversed by the Supreme Court in *Phillips Petroleum Co. v. Texaco Inc.,* 415 U.S. 125. That case was concerned only with federal question jurisdiction under 28 U.S.C. § 1331 (a), and not whether state or federal law controls. The United States was not there a party. Federal jurisdiction is here conceded.

The original *Consolidated Helium Cases* were based on federal interpleader jurisdiction, and also federal law was applied. The case before us on this appeal started as a diversity suit, and the Government has asserted a claim or an interest. We have described at some length above the participation of the United States in this action, especially the initial intervention as a plaintiff expressly under 28 U.S.C. § 1345. It is apparent however that its alignment at all times was with the defendant Phillips on all important issues. No relief was sought by Ashland directly against the United States. The trial court found

the elements of a condemnation or seizure by the United States, but this analysis of the manner in which helium was acquired was considered in the *Consolidated Helium Cases*, and the arguments were rejected.

As a matter apart from jurisdiction, we hold that the trial court's application of federal law was proper. The action of the Government in entering the case as a plaintiff under 28 U.S.C. § 1345 is a significant factor to be considered. The real party in interest thus appeared formally to challenge the claims of Ashland. The Government so asserted that it had a real and substantial interest in the litigation, and that an actual controversy existed between it and Ashland. It is apparent that under the contractual arrangement, the United States undertook to pay to Phillips the amounts that Phillips "shall pay" to other parties for the acquisition of helium in the natural gas above a certain figure. This is in the nature of an indemnity agreement and the contract contains qualifications and limitations not here concerned. The United States is liable for some of the additional amounts which Phillips will have to pay. The Government has thus entered the litigation to assert its own position and interest under the contract. This is initially a matter of dollars, but the Government still has possession of a large part of the helium in question, and this possession can put a somewhat different cast on the problem. These circumstances and the intervention could very well have changed the action to something other than the usual diversity suit at least for the purpose of the application of *Erie v. Tompkins*. This has interesting possibilities, but in any event, the circumstances direct that federal law be applied.

As indicated above, and as demonstrated in *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir.), and by the record here, the Government in the several cases

before this court is faced with claims made by a multitude of interest owners from many states relating to production from Kansas, Oklahoma, and Texas. Each state has somewhat different legal doctrines relating, among other things, to the nature of interests in oil and gas, and what rights are created by oil and gas leases. With the primary liability for the dollars, and for the determination of ownership resting with the United States which obtained possession of the helium, we hold that the application of the rule expressed in *Clearfield Trust Co. v. United States*, 318 U.S. 363, is indicated. One of the most significant factors is the one indicated above, that is, the fact that the United States ended up with the helium. It directed, by contracting, the diversion of the helium to itself before resolving the obvious ownership problems with a multitude of claimants having diverse legal relationships to the helium, depending upon the place where the natural gas was produced and upon their contractual positions. The United States, again by contract, sought to handle these problems by providing for reimbursement to Phillips, and it may have done so. The Government nevertheless obviously has the basic responsibility and liability, as it recognizes by its intervention.

Erie v. Tompkins does not demand the application of state law to all diversity actions. The Court in the *Clearfield Trust* case set out an exception which was there applied to "obligations" of the United States and later expanded. The case concerned the forgery of a Government check, and a delay in notice by the Government to the bank beyond the period contemplated under state law. The Court held that rights of the Government relating to commercial paper it issues are determined by federal and not state law. The Court said that the authority to issue the check in question originated in the Constitution and statutes of the United States and was not dependent on the laws of

any state. In the matter before us, the helium was acquired by the United States by contracts as authorized by federal statutes. This contracting with private enterprise was suggested by statute. As stated by the Court in the cited case, "The desirability of a uniform rule is plain." *See also National Metropolitan Bank v. United States,* 323 U.S. 454, limited by *Bank of America v. Parnell,* 352 U.S. 29. The War Bond cases in state and federal courts lead to the same result. *See In re Stanley's Estate,* 80 P.2d 332 (Colo.). The Court in *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, also indicated a considerable area to be excluded from the application of *Erie.* There an action by the FDIC was brought on a note given to a bank by the defendant, and the Court applied federal law. Also in the shareholders' liability action in *Holmberg v. Armbrecht,* 327 U.S. 392, in the solution of a limitations problem, the federal law was applied. Generally, *see* 59 Harv.L.Rev. 976, and 105 U.Pa.L.Rev. 797.

Under *Clearfield* when the United States seeks to litigate or seek a remedy arising from transactions it has entered into in the ordinary commercial world to carry out its program, it has been held that federal law may be applied. The federal courts can adopt a governing rule of law in such circumstances if there is no statutory direction to the contrary. *Clearfield* expressly so held. 318 U.S. at 366. *See also United States v. Allegheny County,* 322 U.S. 174. *Clearfield* thus indicates that the Court may apply state doctrines or parts of them as "federal law." In *United States v. Standard Oil Co.,* 332 U.S. 301, the Court stated that the interests of the Government and its legal relationships may be so determined. The impact of the application of state law upon the governmental interests is a factor of great weight. *See United States v. Mitchell,* 403 U.S. 190.

The Court in *United States v. Little Lake Misere Land Co.,* 412 U.S. 580, considered the application of a Louisiana

statute to the reservation of a mineral interest in land acquired by the United States. The factors discussed above were there treated, and the process was described as a "choice of law" (federal or state) matter. The Court there said:

> "However, in a setting in which the rights of the United States are at issue in a contract to which it is a party and 'the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that purpose.'" [The quotation included being from Mishkin, 105 U.Pa.L.Rev. at pp. 805-6.]

The Court found further that the federal land acquisition program in *United States v. Little Lake Misere Land Co.* conflicted with the state law on the duration of reserved mineral interests, and said: "The choice of law merges with the constitutional demands of controlling federal legislation; we turn away from state law by default."

In the case before us, the United States was seeking to carry out the Helium Conservation Program then considered of great urgency and importance. It sought to, and did, acquire possession of the helium as directed by the legislation. The action of the Bureau of Mines was efficient and effective. In so doing it set up the contractual barriers between itself and the landowners and gas producers, and also put off the inevitable day of reckoning as to ownership. Phillips is really only a nominal party and looking at the substance, the Government has the responsibility arising from its acquisition and possession of the helium. In the face of the multitude of claimants, the variations in state law, and the *Clearfield* doctrine, the trial court was correct in not applying *Erie v. Tompkins.*

We find no merit to the contention of Phillips that it is entitled to a setoff for any sums previously paid to Ashland for purchases of jurisdictional gas.

The court in the *Consolidated Helium Cases* considered the ownership of the interests, title to the helium, and described how these passed down the gas stream. This determination prevails. The trial court, as to the interest of the landowners-lessors, apparently followed a confiscation-condemnation theory and divided the value of the helium to be recovered from defendant Phillips equally between the lessors and lessees. Our opinion in the *Consolidated Helium Cases* requires that this division be in accordance with the lease terms, and thus the same division as applied to the hydrocarbons. The judgment of the trial court making an equal division between lessor and lessee of the proceeds attributable to helium values must be and is reversed with directions to enter judgment providing for a division in accordance with the terms of the leases, and the terms of other agreements relating to the shares of production, or payment for shares of production, if such be applicable.

The issue of limitations has been raised together with the tolling of whatever statute may be applicable. This litigation concerning the property interests in helium and the right to compensation, considering the related cases, has been protracted and equitable considerations applicable to periods of limitation have come into play. *See deHaas v. Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir.). We must conclude that this action has not been barred. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538.

The trial court acted within its discretion under federal law in the allowance of prejudgment interest. *Royal Indemnity Co. v. United States*, 313 U.S. 289; *St. Paul Mercury Indemnity Co. v. United States*, 201 F.2d 57 (10th Cir.).

As to attorney fees awarded by the trial court, we are unable to find any statutory provision for them or any rule of practice which would authorize such fees. The Supreme Court has, since the trial court's decision, decided *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, a Miller Act case. The opinion includes a direct and intensive consideration of attorney fees. The Court there defines the basic rule:

> "The so-called 'American Rule' governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.' "

The Court concluded that Miller Act suits are "plain and simple commercial litigation," and the Court would not change the American Rule "in the context of everyday commercial litigation." We must hold that this litigation is not so dissimilar to Miller Act suits as to bring about a different result as to attorney fees than expressed in *F. D. Rich Co. See also Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240.

The judgment of the trial court is thus REVERSED as to the award of attorney fees, and as to the equal division between lessor and lessee of the proceeds attributed to the value of the helium, as above indicated. The judgment is also set aside as to the valuation determination with direction to hear further the matters or elements of the work-back method, referred to above, wherein there was insufficient evidence in the record.

Thus some elements have been considered in this opinion and ruled on.

On remand the trial court shall also consider whatever other elements that may be developed at further hearing, in making the value less expense or work-back determination.

Thus, we affirm the use of the work-back method of determining value and the use therein of the $2.00 figure for treatment of crude helium. We set aside the values which the trial court determined by the use of the work-back method. On remand the trial court shall give further consideration to, and receive such evidence as may be admissible bearing on, (1) the proper starting value, (2) the amount chargeable to return on investment, (3) the expense properly allocable to production of hydrocarbons, and (4) such other matters, as are pertinent and not foreclosed herein, that bear on the determination of value by the work-back method.

We affirm the decision of the trial court that the action is not barred by any statute of limitation and that prejudgment interest may be allowed. We reverse those portions of the judgment that (1) allow attorneys' fees and (2) divide the recovery equally between the lessors and the lessees. The lessors may recover only the amounts determined by the royalty provisions of their leases.

AFFIRMED IN PART, REVERSED IN PART, and remanded for further proceedings in the light of this opinion. Each party shall bear its own costs.

DOYLE, Circuit Judge, dissenting.

I respectfully disagree with the result of the majority opinion and, particularly, that part of it which affirms the trial court's use of the work-back theory or approach in determining a reasonable value for the commingled helium at the wellhead. My disagreement stems from

the following: the work-back approach is not the preferred way to determine market value of a commodity; the starting point for determining value is wrong; and the result of its application here is an excessively high price to the government.

Both the government and Phillips Petroleum favor the comparable sales plus expert testimony method; this is the view that I prefer.

I.

WHETHER THE UNITED STATES CONTEMPLATED, AS THE MAJORITY MAINTAINS, THE PAYING OF A SUBSTANTIAL AMOUNT AT A SUBSEQUENT TIME TO LESSEE-PRODUCERS AND LANDOWNERS

I must disagree with the conclusion in the majority opinion that it was within the contemplation of the contracting parties that there would be a large amount paid to interest owners of the commingled helium at some future time. My reasons are as follows:

The Bureau of Mines had entered into contracts for the purchase of extracted helium with four companies, including Phillips, who had possession of the natural gas stream. By so doing the government avoided the necessity for identifying and dealing with all possible interest owners of the helium.

It is true that paragraph 7.4 of the contract with Phillips provided for the partial indemnification of Phillips by the United States for amounts paid subsequent to the date of the contract for the acquisition of helium in the natural gas or for any interest therein. But to raise the obligation of indemnification, the United States had to consent to the payments or the payments must have been judicially determined or they must have been made in

accordance with guidelines established in judicial proceedings. In the Phillips contract indemnification came into being only after Phillips paid in excess of about $3.00 per mcf to third parties for interests in the helium.

The point that is here made is that although the government might have been aware of some indemnification possibility, it did not contemplate the kind of payments that would be necessary if the work-back method were to be followed in both the Ashland and the Helex cases.

The findings of the trial court do not support the statement in the majority opinion that it was contemplated by Phillips and the United States that there would ultimately be substantial compensation paid to the interest owners. Memoranda written by the Associate Solicitor of the Division of Mineral Resources, Department of the Interior, and by the chief helium contract negotiator for the Bureau of Mines mentioned the possibility of increased contract prices if the government required the extraction companies to give a warranty of title without some government indemnification for helium payments. But there is no evidence that the original amounts to be paid were simply a down payment. There was no prior experience of paying large sums of money for this helium. Mr. Wheeler of the Bureau of Mines testified that in building the cost model to arrive at a government negotiation position, a $2.00 per mcf amount for the commingled helium had been used because that amount reflected the government's experience in obtaining a supply of helium-bearing gas. It had never paid more than $3.00 per mcf.

The $3.00 per mcf indemnification level was not an arbitrary figure. It represented a ceiling above actual payments on previous occasions. It was an estimation of the probable maximum price that might be paid. Therefore, it is not an established fact that here would be pay-

ments in excess of $3.00 per mcf as the majority assumes. Even if some excess above $3.00 per mcf was in the minds of the negotiators of the contracts, it was not any great amount. For example, there is no evidence that it was contemplated that the price would go to $10.30. There was no evidence of a belief that it would exceed $2.00 to $3.00. If it was thought that the $2.00 to $3.00 was just the beginning, it seems likely that the extraction companies would have not left the remaining amounts up to $10.00 to $14.00 to chance. Their contemplation would in some way have been expressed.

II.

WHETHER THE EVIDENCE OF COMPARABLE SALES WAS, AS THE MAJORITY MAINTAINS, SO LACKING IN PROBATIVE VALUE AS TO REQUIRE THAT IT BE DISREGARDED

The reasons which the majority opinion gives for rejecting evidence of comparable sales for the purpose of establishing reasonable value include, first, that the transactions described by the witnesses which showed comparable transactions or sales were said to be too remote in time or place. The opinion goes on to say that the testimony did not show a free market condition capable of establishing a usable price.

Secondly, it is said that the helium was part of the gas stream and that this was subject to regulation by the FPC and that this also restricted the opportunities for renegotiation of sales or the negotiation "with new purchases."

The fact that the government was the dominant factor in the market should not, we submit, produce a higher price, for it only tends to show that there was no market

for the conservation program gas. Stated differently, there was no demand for it. Where that is the situation it usually means that it is not worth much. The only reason that it was worth something to the government was because the government had some interest in conserving it. It had some defense projects and space projects in which it might be used and also there is belief by some that in the future it might be of some value in creating an atmosphere for the performance of special tasks. If, as the opinion states, there is neither demand nor market for this, it would seem reasonable to adopt a pricing policy which gives to the lessee-producers such as Ashland actual cost plus a reasonable profit.

My objection to the work-back method is in its artificiality. Interestingly, it fails to start with real cost figures—its beginning is with opinion evidence given by Mr. Garwin, who was employed as manager of the Kerr-McGee plant. He testified on behalf of Ashland. His opinions were based on the price of *pure* helium sold by the government and private companies. He referred to present sales of pure helium on the private market as being $20.00. The government had charged $35.00 not because this represented a fair price. Rather, the government had no choice since it was required by law to charge that amount. The majority apparently has questions about the validity of the $20.00 starting point. It does not give a reason for its dissatisfaction. My objection is its gross excessiveness and its lack of reality.

Moving backward from a $20.00 price for pure helium to the cost of the gas purchased by the government which was not pure helium but was composed of about 50 percent helium and 50 percent nitrogen, deductions for the cost of extracting helium were made. The end result are prices ranging from $11.76 to $16.98 per mcf for the

years 1963-71. The government has already paid to Phillips $10.30 per mcf which includes the cost to Phillips of building an extraction plant. Inasmuch as the government is obligated to indemnify Phillips for all sums exceeding $3.00, this means that the difference between the $11.76 to $16.98 figures and the $3.00 indemnification threshold will in all probability be paid in addition by the government.

The trial court and the majority opinion here made no effort to isolate a rule or procedure to ascertain actual market value either from the standpoint of comparable sales or original cost or reproduction cost. It gave its full and exclusive blessing to the work-back theory. The legal objection to this is its secondary evidentiary character. It is secondary because it is called into use only if it is impossible to ascertain actual market value, from comparable sales, for example. It would have been valid to have used it for comparison purposes, that is to test and to compare the validity of the price arrived at by some other more accepted method, but this has not been done. We find them embracing it wholly and completely. This was not justifiable since there was evidence of comparable sales either at the wellhead or at the inlet of the plant.

It is more specifically objectionable because of the $20.00 starting point. If they were going to select a stage in the process and deduct costs in order to arrive at the selling price at the wellhead or at the plant inlet, they should not have started with a product which has nothing whatever to do with this case, that is they should not have attempted to discover a price for pure helium. Instead they should have looked to prices of conservation helium gas with 50 percent helium content and the remainder nitrogen, for this is the product that is sold

to the government. The beauty of starting with crude conservation helium is that they had a demonstrable sale in front of them and that is the sale from Phillips to the government for the sum of $10.30 for conservation helium. From this point it would only have been necessary to deduct the costs of extraction and of transportation from the wellhead to the extraction plant. Had they done this they would have come up with a price close to $3.00. It could be more or less. For comparison purposes they could look at the actual sales at the wellhead or at the plant inlet and this would have given them a true picture. It is worthy of note that this is exactly what Judge Brown did in the Helex cases, and his result is realistic and reliable. Judge Brown, needless to say, did not accept the work-back theory as an exclusive formula.

In the cases which have used the work-back method, I find that in each instance the court started out with a clearly supported market price and not a contrived one—a price well established in a real market for the specific commodity to be valued—or with proceeds from the actual sale of the commodity at some later point in its processing. *See Freeland v. Sun Oil Company,* 277 F.2d 154 (5th Cir. 1960); *Black Crystal Coal Co. v. Garland Coal and Mining Co.,* 267 F.2d 569 (10th Cir. 1959); *Greer v. Stanolind Oil and Gas Co.,* 200 F.2d 920 (10th Cir. 1952). *See also Stafos v. Missouri Pacific Railroad Co.,* 367 F.2d 314 (1966).

This court in *United States v. Sowards,* 370 F.2d 87, 91 (1966), showed that no one method need be exclusive unless it clearly establishes the price. It pointed out that the federal concept of market value is closely related to selling price on the market and that the best evidence is comparable sales even though the determination is not limited to that method. It approved the use of other data where there are no comparable sales and noted that

in condemnation cases market value may also be based upon reproduction costs or capitalization of net income or an interaction of these methods together with comparable sales. It said that all of this must look to what a willing seller would sell for and a willing buyer would pay. The *Soward* decision nevertheless showed a preference for comparable sales. On the other hand, the work-back method is to be resorted to only where everything else fails.

In summary, then, it was wrong to adopt the work-back method as an exclusive one. It was wrong to start at the point where the trial court started and, of course, the result is an untenable one because it unnecessarily produces an excessive price.

What about the comparable sales which the majority opinion condemns?

We must bear in mind that the contracts entered into by the government looked to prices in 1961. The Keyes plant was cited for example and this involved purchases of gas by the government in 1958 at prices approximating $2.00 per mcf at the extraction plant inlet. The production costs were about $15.50 per mcf, but the basic interest of the seller was to make residue gas marketable by raising the BTU. This was the approach that was used in the Otis plant also. It was seeking to upgrade gas for fuel purposes.

I would submit that the fact that there was this kind of motivation does not outlaw the comparable sales evidence. Removal of helium as an aid to the heating quality of the gas ought not to render the evidence of the sale noncogent.

The purchases of the government plants at Navajo, Exell, Otis and Cunningham are said to be out of time because they occurred in 1945 during the War. They are

hardly more remote from 1961 than are the sales cited by Mr. Garwin, that is the $20.00 sales which occurred in relatively recent times. There were also purchases of helium-bearing gas for the Navajo plant in 1955, 1959, and 1962; all at about $2.00 per mcf for helium context at the plant inlet.

The gas sales agreement between Colorado Interstate and Alamo Chemical Company, a Phillips affilate, which were at $2.00 per mcf does not appear to be out of line. The 1945 Navajo sales just referred to were determined by the Court of Claims to have a value of $2.99 per mcf. The fact that they occurred in 1945 could be taken into account, but this is a two-edged sword because there was some actual demand for this gas during the World War II period.

I am not saying that the comparable sales should be accepted as gospel. This does not mean, however, that we should bury our heads in the sand to them. We can at least view them without fear of being contaminated. The probative value of actual sales is that they provide a more rational and realistic view of value than does some theoretical approach such as the work-back approach because these are actual demonstrations. The majority opinion does not tell us where the social or other value is in the work-back theory. As suggested before, it might be palatable if actual cost figures were used in arriving at a starting point. It is, however, lacking in palatability when the opinion of the chief witness for Ashland that $20.00 is a fair price for pure helium is accepted completely as the starting point for a work-back process.

The foregoing is important because we are dealing not with $100,000 or even a few million. Ultimately if the work-back formula is used this could mean—and we consider not only this case but its companion, the Helex II

cases which have yet to be handed down but which are likely to follow this same formula—hundreds of millions of additional dollars to be paid by the government for a commodity which at best has an uncertain value now and which does not promise to have any added value in the future.

III.

WHETHER TODAY'S DECISION WILL RESULT IN THE GOVERNMENT'S BEING COMPELLED TO PAY AN UNREASONABLY HIGH PRICE, AN AMOUNT WHICH IS BEYOND THE MARKET VALUE OF THE HELIUM GAS

What would be the effect if the work-back method were applied to the *Helex II* cases?

Most of the helium in the United States occurs in Kansas, Oklahoma and Texas. It is not surprising, therefore, that the companion case to this present one, the so-called *Helex II* cases, arose in Kansas. The enormity of the occurrence was probably responsible for the helium conservation program in the beginning. These Kansas cases have been before this court previously. They were filed in 1964. The first one was decided at trial in 1968. It is reported in 292 F. Supp. 619. That decision was reviewed by this court in 1971. *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704. This initial case was primarily concerned with title to the helium. Following remand, trial was had in order to determine value. As in the instant case, the government had already paid a substantial amount, about $12.00 per mcf, which purported to represent the cost of the extraction plants as well as the cost of the helium. The action was in interpleader. Its purpose was to determine the value of the helium and hence the obligation, if any, of the government or a party to pay additional amounts. At the trial

evidence of comparable sales was not dissimilar to the evidence offered at the *Ashland* case. There was a difference. A good deal of opinion and interpretative evidence was offered on behalf of the government. In sum, the government presented a real case in this instance—a much stronger case than was brought forth in *Ashland*. The trial court's findings were much different. Utilizing the comparable sales, and the opinion evidence, the trial court found that the value of helium at the wellhead was .60 to .70 per mcf. As a result, the government was not required to pay any more than $12.00 which it had paid for the gas at the well plus extraction expense including building a plant. This was because the value found was less than the $3.00 amount beyond which the government was required to indemnify. The additional amount, .60 to .70 had to be paid by the Helex companies to the lessee-producers.

If the formula approved in the present case were to be applied to the *Helex* cases there may be a far different result. I am not saying that it will. I do not know. The trial record is superior in the *Helex* cases and this could change it. On the other hand, the work-back doctrine is firmly adopted. If this present *Ashland* ruling becomes a precedent for the upcoming *Helex II* cases, the result could be a disaster to the government in that it could virtually double its cost. The price could go from $12.00 (the amount already paid and which under the *Helex* trial court's decision is the entire sum), to as high as $24.00.

The *Ashland* case is in sharp contrast. The trial court, as we already know, employed the work-back method in arriving at values of commingled helium. The prices which it adopted were $11.76 to $16.98 per mcf for the years 1963-72. This was in addition to the $10.30 already paid by the government to Phillips to cover the total cost of extraction

plus cost of gas at the well. The majority opinion in this case gives restricted approval to the work-back method. It remands for additional proceedings to reconsider three factors used. In remanding the case the majority opinion has not, as we have also noted, given the trial court any guidance as to what is sought and as to how these factors are to be determined. Therefore, the outcome of the remand as it affects the values in the *Ashland* case cannot be anticipated. These values may be lower or they could just as easily be higher. Thus, both the viewpoint and the result in *Ashland* are entirely different from the approach and result in the *Helex II* cases. That is why I am apprehensive as to possible results in the *Helex* cases when the court gets around to applying the work-back theory as now enunciated to the *Helex* cases.

We are mindful that the government has already paid the extraction companies a total of about $12.00 per mcf for the 36,500,000 mcf's of crude helium in *Helex*. This is a sum of about $438 million for helium which has been purchased and which has been stored under the conservation program. We cite it to show the magnitude of this purchase and the extent to which the government would be called upon to indemnify if the work-back method were to be applied in the *Helex II* cases. If the pattern of the present case continues, there could be additional payment of from $9.00 to $12.00 per mcf. It remains to multiply 36,500,000 mcf by the $9.00 or $12.00 addition in order to view the dismal views.

I submit that the *Helex II* cases ought to have been the precedent and the model rather than the *Ashland* case.

* * * * *

Finally, this entire helium conservation program is affected with a public interest. As the majority notes, there is no competition to provide low prices. It is a monopoly condition and the determination of reasonableness of prices has devolved on the courts. The court should, of course, see to it that the companies involved in the production of the helium receive fair compensation. Fair compensation does not mean that the participants should receive profits of the possible magnitude indicated here.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 73-1797, 73-1798, 73-1799

ASHLAND OIL, INC., *Plaintiff,*

v.

PHILLIPS PETROLEUM COMPANY, *Defendant,*

and

UNITED STATES OF AMERICA, *Intervenor.*

(Filed January 27, 1975.)

Richard B. McDermott, Tulsa, Oklahoma (Lloyd G. Minter and Don L. Jemison, Bartlesville, Oklahoma, with him on the Brief), for Appellant.

Gerald Sawatzky, Wichita, Kansas (Stanley G. Andeel and Charles E. Cole, Jr., Wichita, Kansas, Jay W. Elston, Houston, Texas, John M. Imel, Tulsa, Oklahoma, Arloe W. Mayne, Ashland, Kentucky, J. M. O'Loughlin, Houston, Texas; Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, Fulbright & Crooker, Houston, Texas, and Martin, Logan, Moyers, Martin & Conway, Tulsa, Oklahoma, of Counsel, with him on the Brief), for Appellee.

Jacques B. Gelin, Attorney, Department of Justice, Washington, D.C. (Wallace H. Johnson, Assistant Attorney Hubert A. Marlow, Assistant United States Attorney, Edmund B. Clark, Floyd L. France, and Dennis A. Dutterer, Attorneys, Department of Justice, with him on the Brief), for Intervenor-Appellant.

Before BREITENSTEIN, SETH and DOYLE, Circuit Judges.

SETH, Circuit Judge.

This action was brought to recover the reasonable value of helium intermixed with natural gas, extracted therefrom and sold by the defendant Phillips to the United States. The plaintiff prevailed against the defendant and the Government as intervenor in the lower court, and they both appeal. Plaintiff also appeals, but only as to the ultimate division of the proceeds derived from the helium as ordered by the trial court.

The case was commenced in the Southern District of Texas, but transferred at defendant's request to the Northern District of Oklahoma. The complaint asserts jurisdiction based on diversity and this ground was established. The Government intervened as plaintiff, but was realigned as a defendant.

The general description of the occurrence of helium, its characteristics, and how it became an issue is described in the several opinions hereinafter cited. It is, however, necessary to describe the contractual relationship which existed between the defendant Phillips and the Bureau of Mines during the pertinent time period as it bears on the relationship with plaintiff.

The Helium Act (50 U.S.C. §§ 167 et seq.) was directed to the conservation of helium present in natural gas and which was being wasted by the use of the gas as fuel. It was determined that the best method to prevent this loss was to intercept the flow of helium-bearing natural gas after it had been gathered and where large volumes were being transported by pipeline to the fuel consumers, and to extract the helium therein intermingled. At these points the pipeline companies had possession of the gas stream.

The Bureau of Mines pursuant to the Helium Act entered into contracts with those in possession of the natural gas stream to purchase helium after it was extracted from the stream. The record shows that this decision to contract apparently was brought about by the inability of the Bureau to then ascertain the identity of the interest owners in the helium and to deal with them within any reasonable time. The Bureau indicates that there were some 30,000 landowners involved and several hundred lessee-producers of the gas. The production is from several states and the interest owners reside in many different states. By the contracts with the defendant and others the Bureau made possible the construction of extraction plants and soon came into possession of the helium so removed from the large gas stream. Waste of the helium was so prevented, and the purpose of the Helium Act was accomplished.

By the contract with defendant Phillips the helium was physically acquired, but the ownership and compensation problems were put off to another day. The Bureau thus used by this contract the advantageous position of one in possession; postponed the inevitable legal problems, and placed itself in the position of a defendant when the problems came before a court.

In the contract between the United States as buyer and the defendant as seller covering the purchase of helium, a specific amount was provided as the sales price; further, in paragraph 7.4 it was provided that in addition to such amount the buyer would pay to the seller the amounts ". . . that Seller shall pay subsequent to the date of this contract . . . to parties other than itself . . . for the acquisition of helium in the natural gas . . . or for any interest therein." It provided that such payments to qualify would have to be made with the consent of

the buyer, and that "consent" included claims that ". . . have been judicially determined in favor of any claimants by any Federal Court or the highest appellate court of any state," and payments made in accordance with the findings, principles, and conclusions of such "judicial determination." Under the contract formula the defendant would pay the first $3.00 per Mcf to third parties and the Government would pay the rest. The result would be that the ultimate payment to the "owners" was to be so shared by defendant and the United States.

It is obvious that litigation such as this wherein compensation is demanded by the interest owners of the helium was contemplated and was provided for in the contract. It was apparent that some knotty legal problems would have to be met in order to determine who the interest owners were, and to decide whether or not they had already been compensated for the helium under the leases, the gas purchase contracts, or the Natural Gas Act. These postponed legal problems were in large part considered in the *Consolidated Helium Cases* (Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.)). The basic legal relationships among the landowners, producers, and gas purchasers were established, as was the relationship of the Natural Gas Act and the Helium Act. The problem of reasonable compensation, and who should pay, was not decided and was remanded to the trial court. These were decided under federal law in a federal interpleader action.

When the matter of compensation is in issue we are faced with a different segment of the physical and legal journey helium makes from the natural gas well to the storage facilities of the Bureau of Mines than we have considered before. The possession and interception of the gas stream, the separation of the helium therefrom, and its delivery to the United States under the contract ar-

rangement all become important. The relationship of the contracting parties to those who now have been determined to own interests in the helium, and the values of the helium are the center of focus.

The position of the United States as a party herein is somewhat unusual. It filed a motion to intervene as a party plaintiff with a "Complaint in Intervention of the United States" attached. This motion was granted. The complaint of the Government stated that the court had jurisdiction under 28 U.S.C. § 1345, recited the existence of the contract for the purchase of helium from Phillips, asserted that Phillips had delivered to the United States "large quantities of a helium-gas mixture" for which it had been paid "substantial sums of money." This complaint acknowledges that the plaintiff Ashland is seeking "fair market value" of helium in the gas it sold to Phillips which was processed for helium, and the helium sold to the United States under the contract referred to. The Government further alleges that Ashland has already been paid for the helium content along with the hydrocarbons, and in any event the value of the helium content is "nominal." The complaint asserts that: "An actual controversy exists between the United States and Ashland as to whether payments between Phillips and Ashland for the gas as produced was payment for the helium content." The Government also asserts that it ". . . has a real and substantial interest in this litigation because of a provision in its contract with Phillips under which it may be under a duty to indemnify Phillips for additional payments . . ." The Government prayed for a determination that Ashland had already been paid in full, and if not, that the fair market value of the helium was "nominal." Phillips and Ashland answered the Government's complaint, Ashland in its answer prayed for costs and general relief.

As the trial opened, the attorney for Phillips suggested that the United States be realigned as a party defendant. The court then said: "The Court will order that the style be changed to Ashland Oil and Refining Company, Plaintiff, versus Phillips Petroleum and United States of America as defendants." The findings recite that at the Government's request, it was aligned as a defendant and was an intervenor. The United States participated in the trial, cross-examined witnesses, put on a witness of its own, objected to the plaintiff's findings, and submitted proposed findings. The judgment entered ran against Phillips only. The United States has fully participated in this appeal.

As indicated above, this action was brought against the defendant Phillips to recover the reasonable wellhead value of helium commingled with the FPC jurisdictional gas, but separated at defendant's plants constructed pursuant to the Helium Act and delivered to the Bureau of Mines. The contract between the defendant and the Bureau of Mines is considered above. The suit was tried within the holding of Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.) (*The Consolidated Helium Cases,* or *Grounds*).

On this appeal Phillips devotes much of its brief and argument to contentions which were advanced in *Grounds,* there considered and rejected. It would serve no purpose to again treat these arguments in this opinion. Instead it is sufficient to refer to the *Grounds* opinion for the disposition of these points.

The *Grounds* case was remanded for a determination of the reasonable value of the helium in issue, the other points having been decided, and the basic legal relationships determined. Thus here we are faced with the value

problem, and some related issues which have not come from the remanded case but from another direction.

It must be accepted that the "value" sought to be determined in this suit is a factual matter arrived at through the application of the proper legal doctrines. The appellants do not attempt to separate the factual issues from the legal issues in the application of Rule 52.

The appellants urge as a basic error on the part of the trial court that it chose the wrong method in arriving at a valuation. The defendants put on extensive testimony and exhibits as to transactions concerning helium-bearing gas wherein a value was ascribed to the helium component on a market value theory. These events covered a broad time and geographical space, and involved both governmental agencies and private parties. The trial court held that there was no free competitive market, and inferentially held that these transactions were of no probative value because they were not comparable. Instead the trial court used a different valuation method—a value less expense of beneficiation.

The appellants urge that the use of such a value less expense method was error in the face of their market value evidence. The Government on this point cites a number of condemnation cases, including United States v. Miller, 317 U.S. 369; United States v. Sowards, 370 F.2d 87 (10th Cir.); and United States v. Featherston, 325 F.2d 539 (10th Cir.). The record discloses that the rejection by the trial court of the evidence of "sales" was well within its discretion. As indicated above, the transactions which had an arguable similarity were very remote in time or place, and those closer in time and space had little or no similarity. As a matter of law, the trial court was within its discretion, in view of the evidence before it, in selecting the value less ex-

pense formula as a secondary method. There was ample evidence before it on the elements of the method.

The appellants also argue that the value less expense method was improperly applied in that the proof was deficient as to certain elements, that mistakes were made, and that "trifling recognition" was given to certain evidence. We will take these references to mean that there was not substantial evidence on the several factors or elements of the method of valuation.

As to the several elements, the appellants urge that the amount used as the "return on investment" expense was not sufficient. The trial court used a figure which was part of the testimony of plaintiff's witnesses, and the method by which it was arrived at was so presented. There was no substantial contrary evidence presented at trial although on appeal appellants assert deficiencies in the method. This was a factual determination and there was substantial evidence to support the trial court's findings although we might not have reached the same result.

The appellants also object to the allowance made by the trial court of $2.00 per Mcf for the "treatment" of the "crude" helium sold to it by Phillips, but to be incurred by the Government before resale by it, as insufficient in that it did not include transportation and storage. Matters of expense to be incurred subsequent to the delivery and perhaps some transportation from place of delivery to the underground storage are not shown to have been omitted from the $2.00 figure although it was denominated a "treatment" or "processing" cost. In any event, these costs are more properly attributable to the general conservation program as the duration of the storage and additional transportation are unknown factors under the record. The use of the deduction was proper and appellants have

not shown that it was not supported by substantial evidence.

The trial court used a figure of $20.00 per Mcf for the selling price of helium, and this was the "value" element of the value less expense method. This figure was testified to by the witness for the plaintiffs, and the amount is well within the Bureau of Mines Yearbook figures for the several years in issue. The evidence supports this figure also, and this price issue was not directly met by defendant by way of proof.

The Government, in an argument again based on condemnation doctrine, urges that the helium values were *created* by its own purchase program—The Helium Conservation Program, and it should not have to pay for such values. It cites several condemnation cases on this point and United States v. Fuller, 409 U.S. 488, which in turn cited United States v. Cors, 337 U.S. 325. This again concerned payment for something requisitioned by the Government. The issue here is the determination of value of a commodity which was purchased and sold by the Government and by private concerns. This cannot be equated to the cases where the condemnation or the reason for condemnation increases the value of the land taken. The helium has value by reason of its nature and usefulness. The Government may have made this helium available but did not create its value.

The appellants vigorously attack the use by the trial court of the value of hydrocarbon liquids produced at the helium plants in the value less expense calculations. The trial court, on the basis of extensive testimony, and also on exhibits consisting of letters from Phillips, allocated part of the plant expense to these liquids as by-products. The evidence is clear that an increase in the

production of liquids would result from the helium plant operation. This would be an increase over what had been experienced before and over ordinary extraction plants. The witnesses calculated the amount to be so used in the formula. This was not contradicted in amount by appellants, as instead they maintained that the increase in liquid production did not result at all from the treatment of the gas stream for helium extraction. The record shows that increased quantities of wet gas were directed to at least one of the plants and this could make a difference in the production of liquids, but no figures were produced by defendants. Instead the defendants maintained in the face of overwhelming evidence to the contrary that the helium extraction made no difference. Under this state of the record, we must hold that the trial court was justified in using the figures it did as they were supported by substantial evidence. Different quantities of liquids were produced at different plants, and this resulted in different helium values at different plants. This, in view of the evidence, was a consequence of the application of the expense element in the formula. Evidence on this issue was presented by the parties as indicated above, and although the result may not have been as precise as it could have been, it is again a factor supported by substantial evidence.

The Government makes the point that the value of helium at the wellhead determined by the trial court exceeds the base price for the helium-nitrogen mixture it was buying from Phillips under its contract. This is the consequence of the decision, but there is no reason why the wellhead price should be determined by the contract price. The contract between the appellants was negotiated between them alone, and the pricing was the evaluation by them of the entire economic consequences flowing from the con-

tract including many significant factors such as its duration, warranties, and indemnities. We have described the contract at the outset of this opinion. Attention should however be directed again to the evaluations made of the legal questions, especially the title questions. The Government agreed basically to pay Phillips for its interest in the helium and then to pay more if other interest owners established their claims. Thus the price "paid" for all the interests in the helium has not yet been determined. The considerations leading to this method were described above. The value here sought to be established is independent of the contract base amount and covers all interests of the proper parties.

We have considered Lippert v. Angle, 211 Kan. 695, 508 P.2d 920. It states the traditional preference for comparable sales proof. The case does not involve the separate valuation of helium. The plant was very small, and the situation is not comparable in any way. *See also* Greenshields v. Warren Petroleum Corp., 248 F.2d 61 (10th Cir.).

This appeal also raises issues as to the allowance of prejudgment interest, attorney fees, and the matter of limitations. The trial court tried the case as a federal question case, relying on our opinion in Texaco Inc. v. Phillips Petroleum Co., 481 F.2d 70 (10th Cir.), which was thereafter reversed by the Supreme Court in Phillips Petroleum Co. v. Texaco Inc., 415 U.S. 125.

The original *Consolidated Helium Cases* were based on federal interpleader jurisdiction, and also federal law was applied. The case before us on this appeal started as a diversity suit. We have described at some length above the participation of the United States in this action, especially the initial intervention as a plaintiff expressly under 28 U.S.C. § 1345. It is apparent however that its alignment at all times was with the defendant Phillips on all impor-

tant issues. No relief was sought by Ashland directly against the United States. The trial court found the elements of a condemnation or seizure by the United States, but this analysis of the manner in which helium was acquired was considered in the *Consolidated Helium Cases,* and the arguments were rejected.

As a matter apart from jurisdiction, we hold that the trial court's application of federal law was proper. The action of the Government in entering the case as a plaintiff under 28 U.S.C. § 1345 is a significant factor to be considered. The real party in interest thus appeared formally to challenge the claims of Ashland. The Government so asserted that it had a real and substantial interest in the litigation, and that an actual controversy existed between it and Ashland. It is apparent that under the contractual arrangement, the United States is to pay to Phillips the amounts that Phillips "shall pay" to other parties for the acquisition of helium in the natrual gas. Thus the United States is liable for the additional amounts which Phillips will have to pay by reason of this action. The Government has here entered the litigation to assert its own position and interest. This is initially a matter of dollars, but the Government still has possession of a large part of the helium in question, and this possession can put a somewhat different cast on the problem. These circumstances and the intervention could very well have changed the action to something other than the usual diversity suit at least for the purpose of the application of *Erie v. Tompkins.* This has interesting possibilities, but in any event, the circumstances direct that federal law be applied.

As indicated above, and as demonstrated in Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.), and by the record here, the Government is ultimately faced with claims made by many thousands of interest owners

from many states relating to production from Kansas, Oklahoma, and Texas. Each state has different legal doctrines relating, among other things, to the nature of interests in oil and gas, and what rights are created by oil and gas leases. With the primary liability for the dollars, and for the determination of ownership resting with the United States which obtained possession of the helium, we hold that the application of the rule expressed in Clearfield Trust Co. v. United States, 318 U.S. 363, is indicated. One of the most significant factors is the one indicated above, that is, the fact that the United States ended up with the helium. It directed, by contracting, the diversion of the helium to itself before resolving the obvious ownership problems with a multitude of claimants having diverse legal relationships to the helium, depending upon the place where the natural gas was produced and upon their contractual positions. The United States, again by contract, sought to handle these problems by providing for reimbursement to Phillips, and it may have done so. The Government nevertheless obviously has the basic responsibility and liability, as it recognizes by its intervention.

Erie v. Tompkins does not demand the application of state law to all diversity actions. The Court in the *Clearfield Trust* case set out an exception which was there applied to "obligations" of the United States and later expanded. The case concerned the forgery of a Government check, and a delay in notice by the Government to the bank beyond the period contemplated under state law. The Court held that rights of the Government relating to commercial paper it issues are determined by federal and not state law. The Court said that the authority to issue the check in question originated in the Constitution and statutes of the United States and was not dependent on the laws of any state. In the matter before us, the helium was acquired by the United States by contracts as authorized

by federal statutes. This contracting with private enterprise was suggested by statute. As stated by the Court in the cited case, "The desirability of a uniform rule is plain." *See also* National Metropolitan Bank v. United States, 323 U.S. 454, limited by Bank of America v. Parnell, 352 U.S. 29. The War Bond cases in state and federal courts lead to the same result. *See* In re Stanley's Estate, 80 P.2d 332 (Colo.). The Court in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, also indicated a considerable area to be omitted from the application of *Erie*. There an action by the FDIC was brought on a note given to a bank by the defendant, and the Court applied federal law. Also in the shareholders' liability action in Holmberg v. Armbrecht, 327 U.S. 392, in the solution of a limitations problem, the federal law was applied. Generally, *see* 59 Harv. L. Rev. 976, and 105 U.Pa.L.Rev. 797.

Under *Clearfield* when the United States seeks to litigate or seek a remedy arising from transactions it has entered into in the ordinary commercial world to carry out its program, it has been held that federal law may be applied. The federal courts can adopt a governing rule of law in such circumstances if there is no statutory direction to the contrary. *Clearfield* expressly so held. 318 U.S. at 366. *See also* United States v. Allegheny County, 322 U.S. 174. *Clearfield* thus indicates that the Court may apply state doctrines or parts of them as "federal law." In United States v. Standard Oil Co., 332 U.S. 301, the Court stated that the interests of the Government and its legal relationships may be so determined. The impact of the application of state law upon the governmental interests is a factor of great weight. *See* United States v. Mitchell, 402 U.S. 190.

The Court in United States v. Little Lake Misere Land Co., 412 U.S. 580, considered the application of a Louisiana

statute to the reservation of a mineral interest in land acquired by the United States. The factors discussed above were there treated, and the process was described as a "choice of law" (federal or state) matter. The Court there said:

> "However, in a setting in which the rights of the United States are at issue in a contract to which it is a party and 'the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that purpose.'" [The quotation included being from Mishkin, 105 U.Pa.L.Rev. at pp. 805-6.]

The Court found further that the federal land acquisition program in *United States v. Little Lake Misere Land Co.* conflicted with the state law on the duration of reserved mineral interests and said: "The choice of law merges with the constitutional demands of controlling federal legislation; we turn away from state law by default."

In the case before us, the United States was seeking to carry out the Helium Conservation Program then considered of great urgency and importance. It sought to, and did, acquire possession of the helium as directed by the legislation. The action of the Bureau of Mines was effective. In so doing it set up the contractual walls between itself and the land owners and gas producers, and put off the inevitable day of reckoning as to ownership. Phillips is really only a nominal party and looking at the substance, the Government has the responsibility arising from its acquisition and possession of the helium. In the face of the multitude of claimants, the variations in state law, and the Clearfield doctrine, the trial court was correct in not applying *Erie v. Tompkins*.

We find no merit to the contention of Phillips that it is entitled to a setoff for any sums previously paid to Ashland for purchases of jurisdictional gas.

The court in the *Consolidated Helium Cases* considered the ownership of the interests, title to the helium, and described how these passed down the gas stream. This determination prevails. The trial court, as to the interest of the landowners-lessors, apparently followed a confiscation-condemnation theory and divided the value of the helium to be recovered from defendant Phillips equally between the lessors and lessees. Our opinion in the *Consolidated Helium Cases* requires that this division be in accordance with the lease terms, and thus the same division as applied to the hydrocarbons. The judgment of the trial court making an equal division between lessor and lessee of the proceeds attributable to helium values must be and is reversed with directions to enter judgment providing for a division in accordance with the terms of the leases, and the terms of other agreements relating to the shares of production, or payment for shares of production, if such be applicable.

The issue of limitations has been raised together with the tolling of whatever statute may be applicable. This litigation concerning the property interests in helium and the right to compensation, considering the related cases, has been protracted and equitable considerations applicable to periods of limitation have come into play. *See* deHaas v. Empire Petroleum Co., 435 F.2d 1223 (10th Cir.). We must conclude that this action has not been barred. American Pipe & Construction Co. v. Utah, 414 U.S. 538.

The trial court acted within its discretion under federal law in the allowance of prejudgment interest. Royal Indemnity Co. v. United States, 313 U.S. 289; St. Paul Mercury Indemnity Co. v. United States, 201 F.2d 57 (10th Cir.).

As to attorney fees awarded by the trial court, we are unable to find any statutory provision for them or any rule of practice which would authorize such fees. The Supreme Court has, since the trial court's decision, decided F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, a Miller Act case. The opinion includes a direct and intensive consideration of attorneys fees. The Court there defines the basic rule:

> "The so-called 'American Rule' governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees 'are not ordinarily recoverable in the absence of a statute of enforceable contract providing therefor.' "

The Court concluded that Miller Act suits are "plain and simple commercial litigation," and the Court would not change the American Rule "in the context of everyday commercial litigation." We must hold that this litigation is not so dissimilar to Miller Act suits as to bring about a different result as to attorney fees than expressed in *F. D. Rich Co.*

The judgment of the trial court is thus REVERSED as to the award of attorney fees, and as to the equal division between lessor and lessee of the proceeds attributed to the value of the helium, as above indicated. The judgment is AFFIRMED in all other respects.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARCH TERM—May 10, 1977

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Jean S. Breitenstein, Senior Circuit Judge,
The Honorable Oliver Seth, Circuit Judge,
The Honorable Robert H. McWilliams, Circuit Judge,
The Honorable James E. Barrett, Circuit Judge, and
The Honorable William E. Doyle, Circuit Judge

No. 73-1797
No. 73-1798
No. 73-1799
(D.C. No. 67-C-238)

ASHLAND OIL, INC.,
Plaintiff-Appellee and Cross-Appellant,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,
Intervenor-Appellant.

JUDGMENT

This cause came on to be heard en banc on the consolidated record on appeal from the United States District Court for the Northern District of Oklahoma and was argued by counsel and submitted to the Court.

Upon consideration whereof, it is the judgment of this Court that the judgment of the district court is affirmed in part and reversed in part as more fully set forth in this Court's opinion. The cause is remanded to the United States District Court for the Northern District of Oklahoma for further proceedings in light of the opinion of this Court. Each party shall bear its own costs.

/s/ Howard K. Phillips
Howard K. Phillips
Clerk

/s/ Linda A. Hall
Deputy Clerk

IN THE UNITED STATES STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 67-C-238

ASHLAND OIL, INC.,
Plaintiff,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant,

and

UNITED STATES OF AMERICA,
Intervenor.

MEMORANDUM OPINION

(Filed December 28, 1978)

Gerald Sawatzky of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas; John M. Imel of Martin, Logan, Moyers, Martin & Conway, Tulsa, Oklahoma; and W. O. Strong, III, Ashland Oil, Inc., Houston, Texas, Attorneys for Plaintiff Ashland Oil, Inc.

Don L. Jemison, Phillips Petroleum Company, Bartlesville, Oklahoma; and L. K. Smith of Boone, Ellison & Smith, Tulsa, Oklahoma, Attorneys for Defendant Phillips Petroleum Company.

John E. Lindskold, Dennis A. Dutterer and Andrew F. Walch, Department of Justice, Washington, D. C.; and Hubert H. Bryant, United States Attorney, and Hubert A. Marlow, Assistant United States Attorney, Attorneys for Intervenor United States of America.

Before LUTHER BOHANON, United States District Judge

Introduction

(*See also Findings Nos. 1-13*)

Plaintiff Ashland seeks compensation for helium contained in the natural gas stream acquired from plaintiff by defendant Phillips, which was subsequently extracted and sold separately to the United States government. Originally tried in 1973, this case was remanded on appeal to retry controlling factual issues. In the first trial plaintiff and defendants' legal theories and approaches were sufficiently divergent to prevent a joining of issues. Consequently, crucial factual considerations were never fully developed evidentially. At retrial the significant factual matters were developed more fully and thoughtfully than before. Thus, the court must be amenable to discarding earlier erroneous conclusions. The interests of justice, aptly perceived by the circuit court opinion in this case, require no less.

In adjudicating this controversy a second time, the court was assisted by the appellate court's enunciation of certain controlling legal principles. The basic legal relationships among the landowners, producers and gas purchasers were established, notably including the lessee-producer's right to the reasonable value of the contained helium. *Northern Natural Gas Company v. Grounds,* 441 F.2d 704 (10th Cir. 1971); *Ashland Oil, Inc. v. Phillips Petroleum Company* (hereafter *Ashland v. Phillips*), 554 F. 2d 381 at 384 (10th Cir. 1975).

The prime responsibility of this Court is to determine the reasonable value of the helium herein when commingled at the wellhead with other natural gas. *Ashland v. Phillips, supra* at 385-386. Such "value" is basically a factual matter to be ascertained through application of the

appropriate legal doctrines. *Ashland v. Phillips, supra* at 385. Optimally, a product's "fair market value" is determinable by examining comparable sales of the same product. *Ashland v. Phillips, supra* at 387. Significantly, some sales of commingled helium offered in evidence here were too remote in time, and otherwise incomparable, to be relied on solely.

The "Work-Back" Method

The next best approach is the "work-back" or "value less expense" method whereby a raw material's value is extrapolated by using as a starting point an end product of that material whose value is certain. The costs of transforming the raw material from the stage where its value is unknown to that where its value is certain are subtracted from the starting value to reveal the value being sought.

> "The work-back valuation is well recognized in the production and early processing of natural gas. . . . There is nothing unusual about the method, it is subject to proof, and can be just as accurate as any other method, but it is more difficult to apply." *Ashland v. Phillips, supra* at 387.

Effective application of this method requires selection of an appropriate starting value in the form of a processing stage whose product possesses a value certain; accurate assessment of the costs accruing between the known stage and the one in question is also essential. In developing a resource from a raw material into a finished product, each production stage will add economic value to what was initially only the value of the raw material. The value added at each stage of production is essentially the cost of resources used in taking the material through that stage of production. The work-back method es-

sentially establishes at each production stage the value of the product at that point. By subtracting out all production costs, the value of the raw material is revealed.[1] Application of this approach, however, can be difficult. Market structures vary at different production stages and correlating figures from one stage to the next can require abstruse analytical calculations, easily resulting in error. The selected starting point should be as close as possible to the production stage in question.[2]

With these theoretical considerations in mind, two potentially viable starting points emerge. One is helium in its crude form; the other is helium in its pure Grade A refined form, the starting point initially adopted by this court.

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1. "Yes, I am familiar with the workback method of discovering the value of a raw material where there are no comparable sales that can be used to attribute value to it. Essentially, as I understand it, if a raw material is scarce enough to command a price or to have an economic value, then, this raw material may go through several stages of production and production process to turn it into an end product. At each of the production stages, there will be value added to what was originally a value of the raw material. The value added at each stage of production is essentially the cost of resources used in taking the material through that stage of production.

Now, then, a workback amounts to determining at some stage, at some market, at one of the stages of production, what the value of the product up to that point really is. Then, we subtract out the costs and that should leave us with the economic value of the raw material, if the starting point is correct, if the workback is correctly done." (Tr. 368-369, Dr. Richard H. Leftwich, Regents Professor of Economics and former head of the Department of Economics at Oklahoma State University.)

2. ". . . [I]f you work back through several successive stages in going from one stage of the production process to another, there are likely to be errors involved, errors involved in computations. There will be errors involved because market structures differ at differing stages of production, and the more stages of production that you work back through, the more likely we are to compound these errors and to wind up with an erroneous computation, an erroneous value for the raw material. . . . [I]t seems to me that the appropriate starting point is the closest identifiable market to the raw material." (Tr. 369-370, Dr. Leftwich, supra)

See also the testimony of Dr. Ezra Solomon, Dean Witter Professor of Finance at Stanford University, at Tr. 418.

Refined Helium Market
(See also Findings Nos. 14-18)

If one fact has clearly emerged at retrial, it is the inappropriateness of using refined helium prices as a starting value in extrapolating commingled helium's value at the wellhead.

Possession of a production phase where the raw material has been processed to a point of possessing a value certain is crucial to the work-back method, whose efficacy is based on employing known data to extrapolate the unknown. Refined helium prices for the time period relevant to this case were not only distorted by monopolistic market conditions which prevented pure helium's prices from reflecting the product's "fair market value," but even more significantly there was never any relationship whatsoever established between the commingled helium in this case and any refined helium market.

All of the commingled helium in this case was processed into crude helium and placed in underground storage by the government, where it remains today. None has been refined in Grade A helium.[3] It was acquired with

3. ". . . [T]he crude helium that has been put into the government's Cliffside field . . . was never produced to supply current demands. . . . We don't know when it's going to be used. We don't know what purpose it's going to be used for, and we don't know what price it's going to be sold for sometime in the future, when and if it's ever used. . . .

So, it's setting there, and it's in the Cliffside field, and there is 36 billion cubic feet of it. Now, 2 billion cubic feet of that was put in there by the Bureau of Mines, so only 34 billion cubic feet represents helium that was obtained from the conservation companies . . . ." (Tr. 321-322, Henry P. Wheeler, Jr., former Assistant Director to the Bureau of Mines responsible for the government's helium conservation program)

"Q Of all of the helium acquired under the conservation program is all of it in storage at Cliffside?

A Yes, it is." (Tr. 283, 284, Ray D. Munnerlyn, Chief of the Helium Division of the Bureau of Mines)

conservational intent and for consumption at some undetermined future time. Any suggestion that the helium in this case could have been refined and subsequently sold at then prevailing market prices of $20 to $35 per Mcf is at variance with what the most persuasive evidence before this court demonstrates to be the truth.[4]

Refined helium prices during the period in question consistently were distorted by effects of a monopolistic seller's market and never were determined by free and open competition. Government prices based on long-term policy considerations completely dominated the market in the initial years significant to this case, and were influential throughout the entire course of the pertinent time period. Introduction into the refined helium market of even a small percentage of the large helium quantities at issue here would have plummeted prices industry-wide, not only because any reasonable competition would have constituted an effective assault on the then prevailing artificially high price structure, but also due to the relatively inelastic helium demand at the time. Only a small number of end uses for refined helium exist, and those end uses can absorb only limited quantities of refined helium.[5] When a product is available in quantities greatly exceeding anything the market requires or can absorb, the excess amount is worth very little and will tend to severely

4. ". . . Ashland's calculations assume that if more crude had been refined, that the price would not have changed. Basic economic principle called the law of demand tells us that this is false, and the numerical analyses that I have just gone through show just how false this kind of an assumption, an underlying assumption can be. Because only a very small increase in the quantity of crude refined would lead to a relatively large decrease in the price of the Grade A helium." (Tr. 794, Dr. Ronald Braeutigam, Professor of Economics at Northwestern University)

5. "There are a small number of end uses of refined helium and each of these end uses can absorb only limited quantities of refined helium." (Tr. 386, Dr. Leftwich, supra)

depress prices, as competition forces sellers to unload their product for virtually anything they can get.[6]

Large quantities of crude helium were produced and sold in the United States during the years in question. In comparison, very small quantities of refined helium were bought and sold. In light of the inelasticity of demand for refined helium, and the marked disparity volumewise between crude and refined helium, the best evidence indicates that a 1 percent increase in the refinement of available crude helium would have led to a drop in refined helium prices of at least 5 percent, and possibly in excess of 9 percent, depending on the year chosen.[7] Introduction of a large quantity of such helium into the market would have driven the price down to near zero.[8]

The salient fact questions herein can in no manner be resolved by reference to the refined helium market. The helium here was never refined, and it never influenced or was affected by any refined market. Simply stated, in this case refined helium prices represent an inappropriate and unsatisfactory starting point for application of

6. "We could have gone out and been very hard bargainers, playing one of these companies against the other, because obviously some of them are going to get something for their helium and some of them were not . . . ." (Tr. 324, Wheeler, supra)

7. ". . . [T]he volume of the crude helium was something like five to nine times the volume of the helium in the Grade A market, depending on which year you pick. So, for example, if we were to take one percent of the crude in any given year that had been produced and convert that to Grade A, then, you would get from five to nine percent change in the quantity of Grade A helium. And using this information on elasticity of demand, we conclude that the one percent increase in the quantity of crude which is refined would lead to a drop in price in the Grade A market, at least five percent, and maybe even more than nine percent, depending on the year we pick." (Tr. 793, Dr. Braeutigam, supra)

8. "If a very large quantity of Grade A helium or refined helium were thrown on the market, this would drive the price down to near zero." (Tr. 387, Dr. Leftwich, supra)

the work-back method. The best evidence repeatedly emphasizes the ineffectiveness of attempting to infer the value of large quantities of crude or commingled helium, based upon the relatively small number of refined helium market transactions.[9]

Crude Helium Market

(*See also Finding No. 19*)

The other potential starting point for application of the work-back method is the crude helium market. It represents the first processing stage at which helium *per se* is freely marketed and the first form into which commingled helium is separated. The close proximity of the two stages makes work-back calculations easier and more reliable. During the relevant years, crude helium production was much more comparable in quantity to commingled helium production than was refined helium production,

9. "It is simply not proper to infer the value of a large amount of crude helium, based upon the small amount of helium in the Grade A market. And to illustrate this. Suppose we did start with that $20 price of Grade A helium and suppose following the workback method we subtracted off the cost of converting crude helium to Grade A helium to arrive at some kind of net price for crude helium. The next step in the workback method then would be to try to compute a value for all of that crude helium, and this would be done by taking the net price that we calculated and multiplying it by the quantity of crude. The problem which arises is simply this. It imputes a value to all of the crude helium, based upon the $20 attached to only a very small volume in the Grade A market. In other words, the method that was proposed by Ashland assumes, in principle, if not in fact, that we could have refined all of that crude helium and sold it in the Grade A markets and that the price would not change from $20. This violates the fundamental law which economists call the law of demand, namely, we know that if the quantity of Grade A helium had been larger, that the price would have dropped. And this is exactly the point that Ashland has ignored in coming up with this workback method and applying the $20 figure as though we can impute a value to all of that crude helium based on that quantity, which is very small in the Grade A market." (Tr. 789-790, Dr. Braeutigam, supra)

and all the helium at issue was sold and maintained in crude helium form. The crude helium market was by far the largest helium market existent during the pertinent ten year period. Beginning the work-back method here would allow us to make computations on the basis of events and transactions which actually occurred, and would minimize the need for speculation of the type refined helium figures require.

Supply and demand characteristics of the crude helium market were similar in size and structure to those which would have attended a commingled helium market if one had been independently identifiable, and the comparability of these economic factors makes comparisons between the commingled and crude stages much more realistic than comparisons with the refined stage.

Several factors made crude helium prices more representative of helium's fair market value at that level than pure helium prices were at the refined level. When the conservation program was initiated, a great many potential sellers received notice from the government of its intention to buy crude helium, and some 13 or 14 companies expressed interest in contracting as crude helium suppliers. The contracts which finally emerged, including Phillips' contract, followed extensive "good faith" and "arm's length" negotiations. The price paid for crude helium to the "Helex" companies, including Phillips, averaged about $12 per Mcf. While the evidence reveals that the crude helium market was not a perfectly competitive market in the classical economic sense, throughout most of the relevant period there were at least four sellers in the market, dealing at prices freely negotiated, and substantial amounts of crude helium were exchanged within a fairly

narrow range of prices.[10] This market was at least imperfectly competitive and significantly more competitive than the refined market. A rather well developed crude helium market existed, then, during the time period relevant here, generally operating within a price range of $11.00 to $14.00.

Phillips Contract Price

Since the evidence of both Ashland and defendant Phillips offers work-back calculations based on Phillips' actual extraction costs, employing Phillips' actual contract price as a starting value would be ideal if shown to represent a fair and reasonable price for crude helium.[11] The Phillips contract was one of four negotiated with the four "Helex" companies and, like the others, resulted from extensive "arms length" negotiations. The court is now persuaded that Phillips' contract price of approximately $10.30 per Mcf represented a fundamentally fair and reasonable price for crude helium. This contrasts with the first trial,

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10. "I think that to start with we have a market which I would not characterize at the crude level as being a perfectly competitive market, certainly, in the classical economic sense. However, we do have throughout most of the time period I'm talking about evidence that we had at least four sellers in that market, and they were entering into contracts at prices which were not dictated, either by the government or by anyone else. They were freely negotiated prices. I would characterize the market as perhaps imperfectly competitive . . . ." (Tr. 801, Dr. Braeutigam, supra)

"So with these exchanges and very very substantial amounts of crude helium being exchanged, within a fairly narrow range of prices, I think there is no question but what we had a very good market for crude helium existing." (Tr. 375-376, Dr. Leftwich, supra)

11. ". . . [S]ince the workback cost figures that are being used in this case are Phillips' cost figures, Phillips' workback cost figures, then it appears to me that they ought to be applied to a Phillips' price, rather than taking Phillips' cost figures and applying it to some nebulous overall price. If we are going to use Phillips' costs, let's use Phillips' price to do our workback." (Tr. 391, Dr. Leftwich, supra)

wherein the evidence demonstrated no relationship between the negotiated contract price and the fair market value of the helium. *See Ashland v. Phillips, supra* at 384.

Ashland's argument that the contract figure did not represent the full and complete helium "price," due to the contract's indemnity clause, is persuasive on its face but was shown at retrial to be factually unsound. At issue is contractual provision 7.4 of the Phillips contract, wherein the government agreed to indemnify Phillips for amounts in excess of $3.00 paid to third parties for their helium ownership rights. Such provision implies that the complete crude helium price was contemplated to be the base figure of approximately $10.30 plus additional payments required by third party ownership interests. The evidence now establishes that the base figure was considered by the parties to be the full and complete price for the crude helium and that it, in fact, constituted a fair and reasonable price. Phillips' negotiators had been advised by legal counsel that Phillips possessed sole and complete title to all of the contracted helium. Phillips was willing to so warrant its title and was intent on negotiating a contract price reflecting the full and complete value of the crude helium. Approximately half of the helium Phillips contracted to sell was produced from its own gas wells and indisputably belonged to Phillips, and the base contract figure unquestionably represented full payment as to this one-half.[12] Significantly, the indem-

12. ". . . [I]n the case of Phillips, one-half of its total crude sales to the government consisted of commingled gas that was not subject to the indemnity provision. And the price they sold that half at was no different than the price they sold the other half at, which did have something to do with the indemnity provision, which would suggest to me that they could not have given a great deal of weight to that provision in determining the negotiated price they settled on." (Tr. 423, Dr. Solomon, supra)

nification clause was never requested by Phillips, and was never a focal point of negotiations, but was merely inserted at the government's behest to provide continuity with previously negotiated contracts containing the same clause.

Ashland's contentions that the negotiated contract price was depressed by the potential threat of government condemnation of the helium is not supported by the record. The negotiated price essentially represented that dollar figure necessary to induce Phillips to bring forth the amount of crude helium the government wanted to purchase from Phillips.[13] Any evidence indicating a variance between the contract price and the helium's worth would seem to indicate that perhaps the price was slightly too high, since Phillips' bid was accepted for reasons influenced by conservation considerations even though slightly higher than one of its competitors.

Processing Costs

(See also Findings Nos. 25-31)

In computing a cost figure to be applied in the workback method, this court was directed on remand to receive further evidence on, *inter alia,* the appropriate amount chargeable to costs as a return on investment and the amount of helium plant expense properly allocable to production of hydrocarbons and thus not properly chargeable to costs. Having determined that a 15 percent rate of return on investment is appropriate for reasons detailed in the court's attendant findings of fact, and having adjusted the cost figures to allow for hydrocarbon expenses, the court has examined computations based on crude helium values, including Phillips' contract price, in compari-

13. "[The Phillips contract price] was a price that was necessary to induce Phillips to bring forth the amount of crude helium that the government wanted to purchase from Phillips." (Tr. 391, Dr. Leftwich, supra)

son with Phillips' actual costs. The court believes that the fair market value of Ashland's helium at the crude helium stage was in the vicinity of $10.50 to $12.00 per Mcf. Phillips' actual extraction costs during this period averaged out between $6.50 and $7.00 per Mcf at Sherman, and slightly in excess of $10.00 per Mcf at Dumas. Selecting a range of costs between $6.50 and $8.00 per Mcf as being fair, the work-back method reveals that Ashland's recovery should be between $2.50 and $5.50 per Mcf.

Exact Computations

No automatic and exact solution to the problem of valuing commingled helium simplistically emerges from application of the work-back method to the relevant data. A rigid statistical approach preoccupied with mathematical precision would generate rather widely differing values for different "shipments" of commingled helium, depending upon the year of production and the processing plant utilized.[14] Even then such precision could be attained only by delineating an artificially exact crude helium value as a starting point.

The exact contract price between Phillips and the government varied from year to year and plant to plant. The $10.30 price referred to earlier is less expressive of a precise crude helium value than it is of a figure located within a reasonable range of crude helium values. The work-back method reveals only that the commingled helium in this case should be valued somewhere between $2.50 and $5.50 per Mcf, depending upon the comparative weight assigned to the various relevant statistics.

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14. Strict application of the work-back method would indicate that helium processed through the Sherman plant was worth $2.22 more at the wellhead than helium processed through the Dumas plant. (See Tr. 930. John C. Dunn, Economic and Financial Consultant)

Quantum Meruit

Recovery in this case rests upon the doctrine of "quantum meruit," wherein the law implies an agreement and allows recovery of "what is reasonable" and what one "reasonably deserves" for benefits conferred in the absence of an express contract. *Brown v. Wrightsman,* 175 Okla. 189, 51 P.2d 761, 763 (1935) "Quantum meruit" applies where actual contractual intent and mutual assent by the parties is lacking; compensation is afforded based upon reason and justice. *Hillyer v. Pan American Petroleum Corporation,* 225 F.Supp. 425 (N.D. Okla. 1963). This rule of law stresses the inequity of a party refusing to pay for benefits received knowingly and with consent, from someone lawfully authorized to expect remuneration therefor. *Kramer v. Wilson,* 226 S.W.2d 675 (Tex. 1950); *Parks v. Kelley,* 147 S.W.2d 821 (Tex. 1941).

Fair Market Value
(See also Findings Nos. 32-35)

The economic value of commingled helium is not as high as evidence at the first trial led the court to believe. It is not, on the other hand, inconsequential. The circuit court of appeals has correctly emphasized that helium has value by reason of its nature and usefulness, and that the government's conservation program may have preserved such value and made it available, but it did not create such. *Ashland v. Phillips, supra* at 389.

Significantly, however, the evidence at retrial established that helium's uses are limited and its demand is relatively small. This helium demand consistently has been dwarfed by the size of potential supplies. During the period of the helium conservation program and in the years immediately thereafter (1963-1977), only about 40 percent of the helium produced in helium-rich natural

gas was recovered. Since the conservation program was completed, approximately 80 to 90 percent of the helium produced from the major helium-rich gas fields has been discarded at the wellhead and allowed to escape to the atmosphere due to the absence of a viable market.

Even in 1968, during the peak of the helium conservation program, 8.36 billion cubic feet of helium was produced in natural gas, but only 4.59 billion cubic feet was recovered. 3.77 billion cubic feet was vented into the air.

Over 188 billion cubic feet of commingled helium in proved probable reserves of helium-rich gas (containing 0.3 percent helium or more) had been identified as of 1977. An additional 171 billion cubic feet of helium commingled in reserves of less-rich natural gas (containing less than 0.3 percent helium) has been identified. This reserve total of 359 billion cubic feet of commingled helium compares with helium consumption in 1977 totalling 0.9 billion cubic feet.[15]

The helium owners in this case were fortunate that their helium was selected to be conserved. Most of the nation's helium owners possessed no opportunity to sell at any price and received no compensation whatsoever for their helium. While plaintiffs are entitled to "reasonable compensation," this amount must fairly equate with the helium's "fair market value."

A market exists wherever two or more parties contact one another to engage an exchange, and where the parties agree on the terms thereof. The "fair market value" of an item is reflected in the price at which both buyers and sellers are willing to engage an exchange, and the

15. United States Exhibit No. 28.

price at which neither shortages nor surpluses will occur. It is the price at which sellers are induced to bring to market those quantities that buyers are willing to buy at that price. Normally, for a "market" and a "fair market value" to exist, the market price must be sufficient to cover costs of production and a normal profit to the sellers.[16]

Henry P. Wheeler, Jr., former Bureau of Mines employee in charge of the helium conservation program, and the government negotiator with the Helex companies, testified that the government could have purchased all of the commingled helium it desired for $2.00 per Mcf.[17] This analysis is generally supported by the record, including evidence of market conditions existent at the time.

In negotiating with Helex companies, government negotiations employed a "work-up" method to value the

16. ". . . [A] market exists wherever two or more parties contact one another to engage an exchange, and where the parties agree on the terms of exchange." (Tr. 370, Dr. Leftwich, supra)

". . . [T]he market value of any item is reflected by the price at which both buyers and sellers are willing to exchange the item and a price at which neither shortages, nor surpluses, will occur.

Now, I would like to observe further here that the market value of an item is a price at which sellers are just induced to bring to market the quantities that buyers are willing to buy at that price. In other words, the value or the market price of an item must be sufficient to cover cost of production and a normal profit to the sellers, to the producers and the sellers.

The contract prices as a group that the conservation companies received from the government I think must be very close to a market value for crude helium. I think they must be very close to what a competitive price would be." (Tr. 376-377, Dr. Leftwich, supra)

17. ". . . I would say that any application of any theory which comes out with an answer which is much different from $2, either plus or minus a little bit, there is something wrong with the method, because it does not adequately reflect the situation that existed at the time.

Q And why do you say that, sir?

A I was there, I knew what it cost to go out to get helium-bearing natural gas, and I know that I could have gotten all we wanted for $2, or less, and that's what it was worth." (Tr. 337-338, Wheeler, supra)

commingled helium. Similar in principle to the "work-back" method, this approach added cost increments to a selected wellhead starting value in order to arrive at the crude helium's reasonable value. This "work-up" method, whose results provided the bases for the resulting contracts, was predicated on the use of a $2.00 per Mcf value for helium at the wellhead. (See Phillips' Exhibit 71). Dr. Leo Garwin, plaintiff's own expert witness, recognized commingled helium's value during the years in question as being between $2.00 and $3.00.[18] Also, at least one 1966 sale between private parties utilized a $2.00 per Mcf price.[19]

Plaintiff's efforts to predict an eventual high economic value for helium possess little dependability or relevance

18. Tr. 838-848. Dr. Leo Garwin, Consulting Engineer. See finding of fact No. 35.

19.

Q. "Now did Kansas-Nebraska enter into an agreement with Cities Service . . .?
A. Yes, sir, there is a—there is a provision in the processing agreement for a payment for the right to extract the helium.
Q. All right, sir. Do you recall what that payment—
A. Yes, sir, its $2.00 per mcf.
Q. Of contained helium?
A. Yes. sir.
Q. Is that contained helium extracted?
A. Extracted, yes, sir.
Q. And can you tell the court generally how the $2.00 price was arrived at?
A. My memory is that at the time we were negotiating that arrangement with Cities, we only had one pattern to go by, which was a contract between Colorado Interstate and the government at the Keyes, that's K-e-y-e-s, plant and that was $2.00. We are willing to accept that and Cities was willing to pay that, so that's what we arrived at.
Q. All right, sir. And do you recall about what year that would have been in?
A. I think that was probably about 1966, I guess."

(Tr. 14-15. Defendant Phillips' Exhibit No. 39. Deposition of S. D. Ford, Jr., vice president of production and gas supply with Kansas-Nebraska Natural Gas Company)

to this case's issues. Estimates of future demand for most commodities, including helium, are less than reliable.[20] In any event, plaintiff's measure of recovery is tied to commingled helium's value as computed at the time of Phillips' sale. Speculation portends that exorbitant prices may eventually attach to such natural resources as land, water, wood and perhaps even clean air, yet their present economic value is governed by present availability rather than potential future scarcity.

A full and careful review of the record in this case reveals a myriad of considerations relevant to an appropriate valuation of Ashland's helium commingled at the wellhead, none of which, however, individually establish an exact dollar figure. The full range of reasonable values disclosed by the proper application of "work-back" methodology, the structure and salient economic factors of the various helium markets during the period in question, the expert testimony of record, and the equitable considerations collectively suggest that the reasonable value of the commingled helium in this case is between $2.00 and $3.00 per Mcf regardless of the year of production or the extraction plant utilized.

This determination, and the bases therefor, are hereinafter detailed.

In addition to the findings and conclusions in the preceding text, and by way of elaboration thereon, the court delineates the following:

20. "Estimates of the future demand of any commodity are notoriously unreliable and helium is no exception." (Plaintiff's Exhibit 2-31, p. 16, A REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES ON THE ENERGY-RELATED APPLICATIONS OF HELIUM AND RECOMMENDATIONS CONCERNING THE MANAGEMENT OF THE FEDERAL HELIUM PROGRAMS. See also Tr. 982)

FINDINGS OF FACT

Introduction

1. Helium is an unusual element; it is a gas which is inert and noncombustible and is the second lightest known element. Helium is so inert that it will not chemically react or combine with other elements and thus remains as helium forever. It is tasteless, colorless, odorless and invisible. For a more complete description of helium, its unusual characteristics, its uses, and where found, etc., *see Northern Natural Gas Co. v. Grounds, supra* and in the opinion of U. S. District Judge Wesley E. Brown, 292 F. Supp. 619 (D.C. Kan., 1968).

2. In the 1940's, the United States Bureau of Mines was the sole producer of helium in the nation, and it purchased commingled helium in the pipeline at the same price as the natural gas itself, ranging from 5 to 8 cents per Mcf.[21] In the late 1950's the Bureau of Mines purchased helium contained in natural gas in the pipeline for its Keyes plant operation at the price of approximately $2.00 per Mcf contained helium; the Bureau of Mines was willing to pay a premium price for the gas because of the high helium content (2.0 percent rather than 0.5 percent contained helium) which resulted in savings in production costs.

3. Pursuant to the authority granted by Congress in the Helium Act Amendments of 1960 (50 U.S.C. §167 et seq.), the United States entered into long-term crude helium purchase contracts with four companies, the "Helex" companies, to construct plants for the extraction of helium from natural gas streams being produced from the Hugoton-Panhandle area. Each of the contracts was

21. One Mcf is one thousand (1,000) cubic feet.

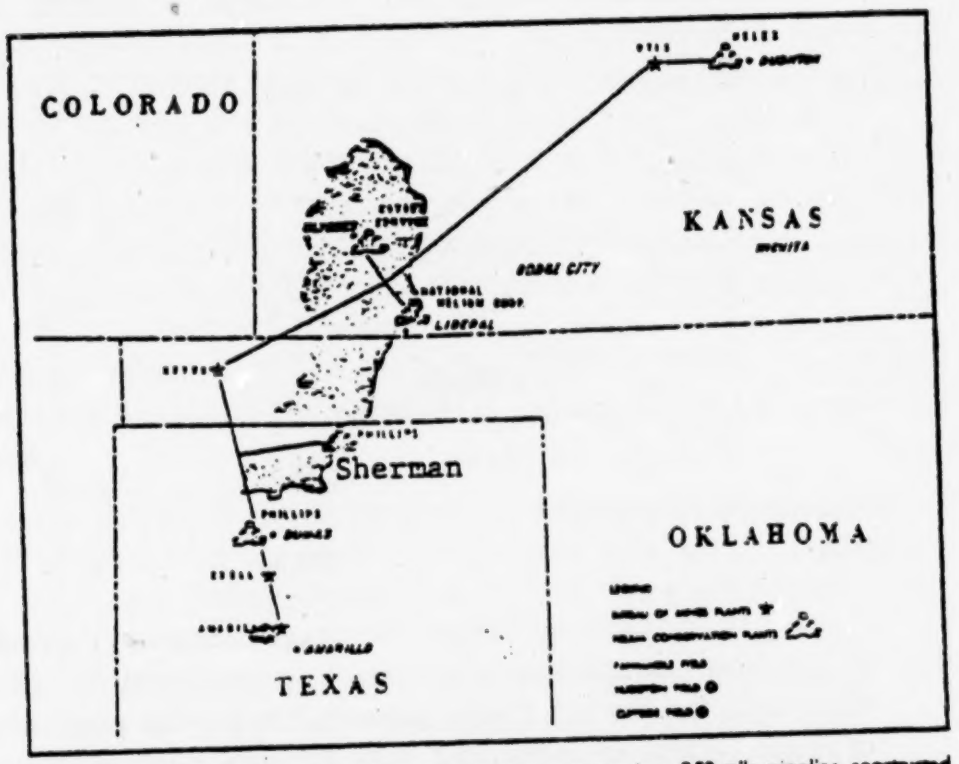
executed on a different date, had three different initial unit prices per Mcf during each year of the contract for the life of the contract. The maximum annual obligation for each contract was different under the limitations imposed by Congress, i.e., only the sum of $47.5 million could be expended annually to buy helium under the Government's program to conserve helium. A summary of the contracts is set forth in Table 1 below:

TABLE 1
SUMMARY OF HELIUM CONSERVATION CONTRACTS

Company	Plant Location and Date of Contract	Initial Unit Price (for 1,000 cubic feet)	Maximum Annual Obligation (million dollars)	Estimated Helium Volume (million cubic feet)	
				Annual Average	Life of Contract
Northern Helex Company	Bushton, Kansas 8-15-61	$11.24	$9.5	675	13,500
Cities Service Helex, Inc.	Ulysses, Kansas 8-22-61	11.78	9.1	610	12,200
National Helium Corp.,	Liberal, Kansas 10-31-61	11.78	15.2	1,053	21,060
Phillips Petroleum Company	Dumas, Texas) and) Sherman Co.,) Texas 11-13-61	2 plants 10.30	13.5	788	15,766
Weighted average—$11.29					
TOTAL			$47.5	3,126	62,526

4. In addition to Phillips Petroleum Company, the last of the Helex companies to enter into a conservation contract with the United States, agreements for the purchase of crude helium were reached with National Helium Corp., Cities Service Helex, Inc., and the Helex Company (later Northern Helex Company).

5. The crude helium conservation system consists of 5 privately owned crude helium production plants, a main pipeline running from Bushtown Plant in Kansas to the storage site at the Cliffside field in Texas and lateral pipelines running from the main pipeline to certain Grade A helium production plants. Three of the conservation plants are located in Kansas: the Bushtown Plant of Northern Helex, the Jay Hawk Plant of City Service Helex and the Liberal Plants of National Helium. The plants at Sherman and Dumas, Texas, belong to Phillips Petroleum.



ESSENTIAL LINK in the nation's helium conservation program is a 353-mile pipeline constructed by the federal government in 1962 and connecting five privately owned and four government-operated extraction plants to an underground storage area in the Cliffside field near Amarillo, Tex.

6. Under the terms of its contract of November 13, 1961, Phillips agreed to sell the United States a helium gas mixture from two plants it proposed to build at Sherman and Dumas, Texas. The plants were constructed to extract for delivery and sale to the government, per the contractual terms, a helium gas mixture (crude helium) of at least 50 percent helium, with the remainder being essentially nitrogen. The nominal capacity for production of crude helium for the Sherman and Dumas plants was 360,000 Mcf per year and 428,000 Mcf per year, respectively. Production began at the Sherman plant in December, 1962, and at the Dumas plant in April, 1963.

7. Three private plants which in 1978 were producing Grade A helium from crude helium, are connected to the helium conservation system by way of private pipelines. These are the plants of Kansas Refined Helium Company, City Service Cryogenics and the Alamo Chemical and Gardener Cryogenics plants, all in Kansas. Of the three Bureau of Mines plants in the conservation system, only the Keyes plant in Oklahoma is still producing Grade A helium from a crude helium stock. The Excell plant and Amarillo plant in Texas are no longer producing Grade A helium for the Bureau of Mines, but are now used to control the pressure in the helium storage reservoir (Excell) and to liquify helium (Amarillo).

8. Other relatively small capacity private plants producing Grade A helium, which are not connected by pipeline to the conservation system, are Linde Division of Union Carbide in Kansas and the Navajo plant of Western Helium Corporation in New Mexico.

9. Helium storage exists in both the pipeline system and the storage system reservoir at Cliffside. Once crude helium enters into the pipeline system, it is considered

in storage and unless dedicated to fulfilling the requirements of the conservation contract is freely transferable from the Helex Company plant owners to the owners of the private Grade A helium producing plants.

10. A total of 33,760,506 Mcf of crude helium was acquired by the United States under the conservation program. Under the contracts, this helium was priced at $405,049,136.89, an average price of $12.03 per Mcf as shown in Table 2 below:

TABLE 2

HELIUM CONSERVATION CONTRACTS SUMMARY

Company	Amount $	Volume Mcf	Average Price $/Mcf
Northern Helex Co.	$ 51,864,201.12	4,475,921	$11.5874
Cities Service Helex, Inc.	84,719,570.87	6,720,927	12.6053
National Helium Corp.	154,775,285.89	12,217,628	12.6682
Phillips Petroleum Co.	113,690,079.01	10,256,030	11.0852
TOTAL	$405,049,136.89	33,670,506	$12.0298

11. Of these amounts, Phillips conveyed to the United States 10,256,030 Mcf of helium, priced under the contract at $113,690,079.01, an average of $11.0852 per Mcf.

12. At the time of termination in 1973, the government had approximately 35 billion cubic feet of helium in storage in the Cliffside Field in Texas, and it was estimated that about four billion cubic feet of helium was contained in the government-owned native gas in that field. It was also estimated that approximately 5.5 billion

cubic feet of helium would be recovered in the Keyes plant under its natural gas supply agreement. This assured the government a supply of 44.5 billion cubic feet of helium. As a result, the Secretary of the Interior found on February 2, 1973, that the objective of the Helium Act had been met. The objectives were to

> "foster and encourage individual enterprise in the development and distribution of supplies of helium, and at the same time provide, within economic limits . . . a sustained supply of helium which, together with supplies available or expected to become available otherwise, will be sufficient to provide for essential government activities." 50 U.S.C. 167m.

13. Approximately 42.8 billion cubic feet of helium is presently stored in Cliffside. Of this 42.8 billion, 32.2 billion was purchased under the helium conservation contracts; 1.5 billion was accepted in storage under court order; 3.5 billion was produced at Bureau of Mines plants; and 4.0 billion is contained in native gas. All of the approximately 34 billion cubic feet of helium acquired under the conservation program remains in storage at Cliffside. Assuming that the 34 billion cubic feet obtained from the conservation companies was worth $10 per Mcf, the government has an investment in the helium stored at Cliffside of $340 million. Assuming, again, that the invested money could draw 10 percent interest a year if properly invested, the United States is paying at least $34 million a year in interest to keep the helium in storage. The storage cost is about the largest cost item associated with the helium acquired under the conservation program.

Refined Helium Market

14. No relationship exists between Grade A helium prices and either the crude helium sold by Phillips to the United States or the crude helium sold to the United States pursuant to any other conservation contracts. All such crude helium was placed in underground storage by the government and so remains. None has been refined into Grade A helium. It was not produced to supply current demands, but was produced to be saved and not wasted when the helium-bearing natural gas went to market. It is not known when the stored crude helium will be used; the purpose for which it will be used; nor the price at which it will be sold.

15. During the ten years involved in this case, approximately 92 billion cubic feet of helium was produced at the wellhead; 48 billion cubic feet of helium was not recovered, but instead was wasted into the atmosphere as the natural gas containing such helium was marketed. 44 billion cubic feet of helium was recovered in the United States, all of which was initially recovered as crude helium. Of this amount, 36 billion cubic feet was placed in underground storage by the government and remains there at this time. Of this 36 billion cubic feet in storage, 34 billion cubic feet represents all the crude helium sold by Phillips and the other conservation companies to the government. Of the 44 billion cubic feet of helium extracted and saved, only 8 billion cubic feet was refined into Grade A helium and only approximately 3.3 billion cubic feet was sold to private customers during the years in question. It is now clear that it would be improper to attempt to value the 34 billion cubic feet of conservation crude helium in storage by any price the 3.3 billion cubic feet of refined helium may have sold for. To do so would require the assumption that all of the 34 billion

cubic feet of stored crude helium could have been refined and sold in the Grade A market. It is clear that such could not have been done without drastically reducing the price of Grade A helium.

16. The prices paid for Grade A helium during 1963 through 1972 are not sufficiently reliable as indications of value to serve as a starting point. It is uncontroverted that the government's 1961 price of $35.00 was adopted for the express purpose of creating sufficient income from government sales of refined helium to pay Phillips and the other conservation companies for the crude helium they were selling the government for storage, as well as to pay all other expenses associated with the storage program. Previous to that price, the government was selling Grade A helium to government users at $15.50 per Mcf and to private users at $19.00 per Mcf. The $35.00 price was never intended to represent a fair market value for helium. Nonetheless, the $35.00 price was the only price available during all of 1963, 1964, 1965 and a substantial portion of 1966. During those years there was only one other seller of Grade A helium (Kerr McGee), and one of Ashland's witnesses, then an employee of Kerr McGee, affirmed that Kerr McGee purposely fixed its price to be equal to the posted government prices - whatever they might be - so that whatever the government price was, the Kerr McGee price was also. The helium the government sold during the ten years involved herein was produced by the government itself and was not purchased from the Helex companies.

17. After 1966 there was little stability of Grade A prices. Although Grade A helium producers began operations in 1966 through 1968 and the prices which they charged were significantly less than $35.00 per Mcf, there was no particular proximity of prices. One seller of Grade

A helium in 1966 (Kansas Refined Helium) sold its product for an average price of $16.37 per Mcf and in 1967 for $17.68 per Mcf. At the same time other sellers in 1967 were selling the same product for $25.57 and $35.00 per Mcf. A former Kerr McGee employee testified that he was personally familiar with an attempt to sell Grade A helium at $15.00 per Mcf in 1967. Weighted average Grade A helium prices charged by private parties f.o.b. the plant decreased from $25.39 per Mcf in 1966 to $20.21 in 1972, although Kerr McGee reduced its posted price to $19.00 in 1969 and maintained such until April 25, 1972.

18. During the 1962-1972 period the volume of Grade A refined helium sales varied substantially; sales of 611,000 Mcf in 1962 rose to 929,000 Mcf in 1969 and then steadily fell to 580,000 Mcf in 1972. As private companies began producing Grade A helium, the government's share of the commercial market continuously decreased from a high of about 135,600 Mcf in 1962 to a low of 6,279 Mcf in 1972.

Crude Helium Market

19. There is now, and was at all times since the commencement of the conservation contracts, a market for crude helium. This market consists of all crude helium sold to the government for storage purposes under the Helium Conservation Act, as well as all sales and purchases between private parties, all within a fairly narrow range of prices. Phillips' Exhibits 43, 44 and 45 describe the details of very substantial crude helium exchanges. Exhibit 43 reflects that the government purchased, between 1963 and 1972, approximately 31,400,000 Mcf of contained helium. Private parties exchanged more than 675,000 Mcf in just slightly more than six years beginning in late

1966 and ending in 1972, and approximately 686,000 Mcf in the three years thereafter. The crude helium market was by far the largest helium market in existence during the ten years herein. Numerous witnesses, including representatives of many of the purchasers and sellers of crude helium, testified that a well defined market for crude helium existed. The president of National Helium stated that a crude helium market existed and continues to exist, as did the vice president of Northern Helex. Similar expressions were received from representatives of Cities Service and Kansas Refined Helium, crude helium's largest private purchaser. Each testified extensively regarding the circumstances of each sale, the volumes sold, the prices received and the contract terms generally.

Phillips Contract Price

20. In the original trial of this case very little evidence was offered describing the negotiations which led to the contracts above-mentioned and, particularly, to the contract of November 13, 1961, between Phillips and the United States, and no relationship between the contract prices and any then existing markets or market values was developed of record. Credible written and oral evidence of these matters is now before the court.

21. As previously mentioned, the Phillips contract, which was the last of the four contracts to be negotiated with the Helex companies, resulted from intense negotiations between Mr. Henry Wheeler, the former Director of the Helium Conservation Program, representing the United States, and officials of Phillips Petroleum Company. Funds were available for only one more conservation contract with a crude helium producing company; and two companies, Phillips and Colorado Interstate, were both interested in acquiring a government contract. Dur-

ing negotiations with Phillips, Mr. Wheeler negotiated the price downward to $10.30 Mcf. Meanwhile, Colorado Interstate had offered to convey crude helium to the government at a price of $10.10 per Mcf. Despite the small price advantage offered by Colorado Interstate, Mr. Wheeler selected Phillips Petroleum because by doing so a greater volume of helium would be conserved.

22. Article 7.4 of the Phillips' contract provided that the United States would indemnify Phillips for any amount over approximately $3.00 per Mcf which Phillips might be required to pay third parties for acquisition of the commingled helium. Phillips had not requested that this indemnification be placed in the contract. Mr. Henry Wheeler testified that the clause was included so that the government would be treating all of the contractors alike. The testimony of Mr. Wheeler and Mr. Cullender, a member of the Phillips team that negotiated the contract, and the deposition of Mr. Wilson, the negotiator for National Helium, all established that Article 7.4 had no influence whatsoever on the price the United States paid for crude helium. The evidence reflects that Phillips believed it had title to the helium when it entered into the contract, that it did not request the indemnity provision, and in fact, did not consider its effect.[22]

Originally, Phillips had submitted a written proposal of $11.48 per Mcf wherein it offered to warrant its title. The government rejected such offer because it thought the price too high. The government countered with its own proposed contract, suggesting a figure of approxi-

22. In any event, more than one-half of the helium sold by Phillips to the government was not covered by Article 7.4 for it was produced from Phillips' own gas wells. Since paragraph 7.4 is irrelevant as to Phillips owned gas, the sale of helium produced by Phillips from its own wells represents a substantial comparable sale which clearly supports the use of Phillips' contract price as the starting value.

mately $10.30 per Mcf. Such proposal contained no provision for title warranty by Phillips, but instead included the government indemnity clause discussed earlier. Neither side's actions evidenced a belief that the title question raised any issue of serious economic import.

23. The $10.30 price in the Phillips contract, adjusted only by the price index provision in paragraph 7.3, was deemed by both Phillips and the government as the complete price and value of the crude helium. The indemnity provision was not deemed or intended by either as part of the purchase price. Similarly, the National Helium negotiator testified that in his opinion the contract price agreed between the government and National Helium was exactly representative of the crude helium's value at the time of the execution of the contract.

In addition, the United States' power of condemnation does not appear to have been a factor in the negotiation of the conservation contracts, since use of such power was neither threatened nor suggested. Phillips' concern was not that the United States would seek to condemn the helium, but, rather, that the United States would enter into a contract with some other party for the purchase of crude helium and thereby deny Phillips the opportunity to sell its helium to the United States.

24. As noted above, in 1966 several sales of substantial quantities of crude helium occurred between private parties, and sales continued to be made during all the years in question. In all instances the sellers sold the crude helium for prices comparable to those set forth in the conservation contracts and at least four substantial sales between 1967 and 1972 involved full title warranty by the seller. These sales with full title warranty strongly indicate that the conservation contract prices were not unduly low and were not forced downward by the presence

of the indemnification clauses. The indemnification clauses caused no one to undervalue the helium.

Processing Costs

25. Effective application of the work-back method requires that the proper costs be deducted from the proper starting value. In this case the relevant costs are all helium plant expenses allocable to helium production, plus an appropriate return on the amount of capital employed in such production.

26. Disputes between the parties on "cost" issues include disagreements as to the amount of plant expenses allocable to helium, the amount of capital allocable to helium, the rate of return to be allowed and whether in calculating this rate of return there should be included a sum sufficient to cover income taxes.

27. Phillips' accounting witness utilized essentially the same "capital employed" and plant expenses used by Ashland's accounting witness but made certain adjustments thereto. These adjustments to "capital employed" entailed:

(a) an increase in the amount of working capital based on Phillips' actual working capital;

(b) provision of a return on deferred testing (start-up) costs which were amortized over the life of the contract;

(c) inclusion of accounts receivable Phillips was required to finance and for which there was no provision for interest.

These changes reflect an accurate and appropriate approach in this case for computing "capital employed."

Ashland has never complained that Phillips was an inefficient helium extractor and in fact the evidence is

quite to the contrary. Therefore, there is no justification for plaintiff's suggested approach of using Phillips' actual costs in some instances, while applying a formula for determining working capital when Phillips' actual working capital appears to plaintiff to be larger than needed.

28. Determination of the return rate properly allowable to Phillips involves ascertainment of the return rate necessary at the time to induce Phillips' management to make the initial investment. Each of the experts testifying on the return issue for Phillips and the government was actually engaged during the period in question in the investment decision-making process of substantial corporations, and each testified that the minimum rate of return necessary to have caused a knowledgeable investor to make the investment made by Phillips was 15 percent after taxes. The testimony of Phillips' employees fully supports this conclusion.

The court finds that the prospect of a 15 percent after-tax return was required to induce Phillips or any other knowledgeable investor to enter into the contract involved here. Phillips' helium plant costs should, therefore, include such a return.

29. To effect the appropriate after-tax return, monies paid in income taxes should be included as a cost item. Failure to include income taxes would, under the work-back method of valuation, place too high a value on the helium at the wellhead.

30. The issue of expenses properly allocable to hydrocarbon production results from the fact that helium plant operations concentrate liquefiable hydrocarbons contained in the natural gas processed at the helium plants. These concentrated liquefiable hydrocarbons leave the helium plant in what is termed the "rich gas stream," which then

enters a gasoline plant where further processing and extraction of liquefiable hydrocarbons occurs. The efficiency of the gasoline plant is improved by the helium plant's concentration of the liquefiable hydrocarbons.[23]

31. The court finds that allocation of helium plant expenses to the production of hydrocarbons should be based on the "functional cost benefit method" proposed by Phillips. Helium plant investment and expenses should be allocated between crude helium production and production of the rich gas stream. Phillips' method of allocation results in an allocation of helium plant costs on an equitable basis and in a logical manner. The incremental liquids credit proposed by Ashland is subject to various compelling criticisms, both as to the basis for its calculations and its potentially inequitable results.

Fair Market Value

32. In 1977, of the total 6.92 billion cubic feet of commingled helium produced, a mere 1.38 billion cubic

23. Ashland contends that the net value of the additional liquids (called incremental liquids by Ashland) should be used under the by-product cost accounting method to reduce the cost of helium extraction. On its exhibits Ashland adds the net value of these incremental liquids to the wellhead value of the helium but the effect is the same as subtracting these net liquid values from the cost of helium extraction before determining the wellhead value of the helium. Phillips contends that Ashland has not properly calculated the volume of what it calls incremental liquids in that the base period selected by Ashland does not actually reflect what the liquid recovery would have been in succeeding years had the helium plants not been built and that Ashland has been arbitrary in its determination of the incremental liquids inasmuch as it has failed to take into account the fact that processing the natural gas through the helium plants actually caused a reduction in the recovery of the most valuable of these liquid products. Phillips contends that Ashland has already received the benefit of Phillips' cost savings and that no allocation of expenses to hydrocarbon production is necessary. Furthermore, Phillips contends that if an allocation of helium plant expenses to the production of hydrocarbons must be made, then the allocation should be made on the basis of a functional benefit cost study.

feet was recovered. This small recovery results from helium's market demand being tremendously overmatched by available supplies. For example, even though cheap storage of helium is available at Cliffside, Cities Service Helex, one of the companies with the existing capacity to recover helium, is simply venting it to the atmosphere despite being connected to the conservation system. Neither the National Helium plant at Liberal nor the Phillips-Dumas plant are producing crude helium for storage.

33. In excess of 188 billion cubic feet of contained helium in proved or probable reserves of helium-rich gas (containing 0.3 percent helium or more) had been identified as of 1977. Of that 188 billion cubic feet, 105 billion cubic feet is in non-depleting reserves, i.e., it is either in storage at Cliffside or is contained in natural gas of a low heating value which is not being produced.

34. A $2.00 per Mcf price for commingled helium was used by the Bureau of Mines in computing the price it was willing to pay under the helium conservation program. The four Helex companies in good faith believed that they owned the helium contained in the natural gas and accepted $2.00 per Mcf as the value of the commingled helium.

35. Dr. Leo Garwin, witness for Ashland, authored an article published in the April, 1969, issue of "Hydrocarbon Processing," wherein he stated that the helium content in natural gas "is normally worth between $2.00 and $3.00 per Mcf. Similarly, in a letter dated September 12, 1969, to the Chairman of the House Committee on Interior and Insular Affairs, Dr. Garwin referred to the value of helium contained in natural gas as $2.00 to $3.00 per Mcf; and in 1967 Dr. Garwin testified on behalf of Ashland at an arbitration proceeding that the value of helium con-

tained in natural gas owned by Ashland was $2.35 per Mcf.[24]

CONCLUSIONS OF LAW

1. This court's responsibilities and duties on remand are set forth in the appellate opinion in this case rendered subsequent to the first trial. *Ashland v. Phillips,* 554 F.2d 381 (10th Cir. 1975).

2. Ashland's suit for the reasonable value of the helium in controversy here is, in effect, an action in quantum meruit. *See Phillips Petroleum Co. v. Texaco Inc.* 415 U.S. 125 (1974).

3. The court of Civil Appeals for the State of Texas, the state where this action was commenced, has observed:

> "quantum meruit, [is] a creature of equity, . . ." *University State Bank v. Gifford-Mill Const. Corp.,* 431 S.W.2d 561 (Tx. Ct. Civil Appeals 1968).

That court has further held that quantum meruit actions "rest their holdings upon equity and justice" and that recoveries thereunder require "equity and justice." *Schiltree County v. Hedrick,* 366 S.W.2d 866 (Tx. Ct. Civil Appeals 1963).

4. Strict adherence to exact mathematical formulations which fail to encompass the equities in this case is inappropriate. The Court must seek equity and justice for all parties.

5. For example, the wellhead values for helium extracted at the two plants for the years 1963-1971 vary from a minus $.40 per Mcf to $5.34 per Mcf of helium. Additionally, the values of helium vary from plant to plant

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24. Tr. 838-848; United States Exhibit Nos. 36, 37; Dr. Garwin, supra.

for exactly the same year; the value of the helium extracted from the Sherman plant in 1968 was $4.34 and the value of helium extracted from the Dumas plant for the same year is $.41 per Mcf. The court believes this clearly illustrates that rigid application of mathematical calculations under the work-back method would render fractured and inequitable results.

6. Equitable considerations indicate that a single uniform value for commingled helium should be applied to all of the helium extracted at both the Sherman and Dumas plants for each year.

7. The reasonable value of the helium commingled at the wellhead should be the sum that would have resulted from fair negotiations between an owner willing to sell and a purchaser desiring to buy. *Standard Oil Company v. Southern Pacific Company,* 268 U.S. 146 at 155 (1925)

8. Based upon all of the oral and documentary evidence presented by the parties during this trial and the first trial, the court concludes that the reasonable value of the commingled helium is $3.00 per Mcf of contained helium for each and every year that helium was produced, regardless of the plant from which it was produced.

9. Plaintiff Ashland is entitled to judgment against defendant Phillips as to the 72,748 Mcf of contained helium at issue in this case, in the amount of $218,244.00.

10. Generally, interest is awarded only where the amount involved is liquidated. *Palmer v. Radio Corporation of America,* 453 F.2d 1133 at 1140 (5th Cir. 1971) Previous to judgment herein, the amount owed Ashland has remained unliquidated. Phillips asserted a good faith and persuasive title claim to the commingled helium previous to the opinion in *Northern Natural Gas Company v.*

Grounds, supra. Subsequently, the helium's value has remained very much in dispute.

Ashland is entitled to interest as of the judgment date herein, as provided by law.

An appropriate judgment will be entered herein.

Dated this 28th day of December, 1978.

/s/ Luther Bohanon
United States District Judge

UNITED STATES DISTRICT COURT,
N. D. OKLAHOMA.

No. 67-C-238.

ASHLAND OIL, INC., *Plaintiff,*
Plaintiff,

v.

PHILLIPS PETROLEUM COMPANY, *Defendant.*

and

UNITED STATES OF AMERICA, *Intervenor.*

Aug. 13, 1973.
As Corrected Aug. 31, 1973.

OPINION

BOHANNON, District Judge.

This action was initially instituted in the United States District Court for the Southern District of Texas, and was later, by proper proceedings transferred to this Court for trial and disposition. Ashland Oil and Refining Company (hereinafter referred to as Ashland) originally claimed the right to recover moneys from Phillips Petroleum Company (hereinafter referred to as Phillips) representing an alleged deficiency in payments for sale of natural gas under the jurisdiction of the Federal Power Commission. Ashland also asserted claims against Phillips to be paid for helium contained in the jurisdictional mass of natural gas, and which was extracted from the natural gas stream by Phillips under contract with the United States of America through the Department of Interior, Bureau of Mines.

The Court has diversity jurisdiction and federal question jurisdiction, 28 U.S.C.A. §§ 1331(a) and 1332.

Ashland abandoned its claim against Phillips for deficiency payments for sale of natural gas under the jurisdiction of the Federal Power Commission by reason of proceedings before the Federal Power Commission, and an appeal from its order (Ashland Oil and Refining Company v. FPC, 421 F.2d 17, 6th C.A.). Consequently, the only claim remaining for trial and determination by this Court is Ashland's claim for recovery of the reasonable value of helium contained in the natural gas stream delivered by Ashland to Phillips.

Plaintiff Ashland acquired all of the interests of United Producing Company which had entered into a contract with Phillips Petroleum Company on November 8, 1945 (amended Oct. 1, 1950 & June 27, 1956) providing for the sale of natural gas from 15 wells located in Sherman County, Texas. These same parties entered into another gas purchase agreement on April 15, 1953, (amended June 27, 1956) providing for the sale of natural gas from three wells in Hansford County, Texas. These agreements were properly filed with the Federal Power Commission as provided by law and rate schedules were fixed for the sale of said gas. These filings were required under the Natural Gas Act (15 U.S.C. § 717 et seq.) because Ashland's deliveries to Phillips constituted sales of natural gas for resale in interstate commerce. Ashland succeeded to all the rights and interest of United Producing Company. All of the wells above referred to are subject to the contract between Ashland, as successor to United Producing Company, and Phillips Petroleum Company, and Phillips Petroleum Company extracted helium which was contained in the natural gas stream as delivered by Ashland to Phillips.

Ashland's contention is that the title to the helium in the contained natural gas did not pass to Phillips under the gas purchase contracts and if and when Phillips elected to extract the helium from the natural gas stream, plaintiff Ashland was entitled to payment therefor from Phillips for the reasonable value of such helium less certain costs of extraction, and other deductions hereafter referred to.

The defendant contends that when it purchased the gas stream from Ashland, it purchased all of the elements thereof including the helium, and inasmuch as Phillips paid Ashland the Federal Power Commission rate for the gas delivered to Phillips, Phillips became the owner of the entire stream, including the helium, and therefore, is not liable in any sum to Ashland for the helium extracted. Further, Phillips presents the defense of Statute of Limitations claiming that if liable, they are liable only for the helium extracted from the natural gas for two years prior to the filing of this action and thereafter; further Phillips claims that by reason of payment to Ashland for the natural gas, plaintiff is barred by the defenses of accounts stated, accord and satisfaction, and to require payment now would be a violation of the Fifth Amendment to the Constitution of the United States.

The United States of America by Order of the Court was realigned as a party defendant.

Findings

1. Helium is an unusual element; it is a gas which is inert and noncombustible and is the second lightest element known. Helium is so inert that it will not chemically react or combine with other elements and thus remains as helium forever. It is tasteless, colorless, odorless and invisible. For a more complete description of helium, its unusual characteristics, its uses, and where found, etc., see

Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10 C.A.) and in the Opinion of District Judge Wesley E. Brown, 292 F.Supp. 619 (D.C.Kan.).

2. The United States of America, through the Department of Interior and the Bureau of Mines of the Department recognizing the need for the conservation of this rare material and its scarcity, and its need for defense purposes and other important uses, Congress enacted the Helium Act Amendments of 1960 (50 U.S.C. § 167 et seq.) authorizing the United States to enter into a program of conservation of helium for future use; under this program, private companies negotiated contracts with the United States of America through the Department of Interior, Bureau of Mines, to construct plants for the extraction of helium from natural gas streams, then being produced from the Hugoton-Panhandle area; otherwise, this valuable material would be lost at the burner tip of the ultimate user of the gas and discharged into the air as residue.

3. Prior to 1961, the United States Government, with minor exceptions for a short time, was the sole extractor and source of commercial helium. It controlled and fixed the price of all wholesale sales of helium.

4. Pursuant to the authority granted by Congress, the United States entered into five long-term helium purchase contracts with four companies, one of which was Phillips Petroleum Company, which contracted on November 13, 1961, with the United States to sell a helium gas mixture from two plants it proposed to build, the Sherman Helium Plant and the Dumas Helium Plant. These plants were constructed so as to extract for delivery and sale to the government a helium gas mixture (crude helium) which was to consist of at least 50% helium under the contract requirements, the remainder being essentially nitrogen. Under this contract, the United States agreed

to pay a base price of $10.30 per m. c. f. (thousand cubic feet) of contained helium in the crude product, which price was subject to escalation in accordance with the contract. The base price was also subject to escalation in the event Phillips was required to pay third parties "for the acquisition of helium."[1] Specifically, under the contract between the United States and Phillips, producers of commingled helium such as Ashland the mineral or royalty owners, being third parties, and if they were entitled to recover from Phillips the reasonable value of the helium produced from the commingled gas Phillips was required to pay under paragraph 7.4 of the contract, part 2 of the unit price only approximately $3.00 per m. c. f. and the United States under the contract was required to reimburse or indemnify Phillips for any excess of $3.00 per m. c. f. which Phillips was required to pay. This was an important part of the contract because it indemnified Phillips against required payments to third parties of the amount in excess of $3.00 per m. c. f. and

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1. "In addition to all other amounts payable under this contract Buyer shall pay to Seller all amounts, except as hereinafter provided, that Seller shall pay subsequent to the date of this contract, directly or through an affiliated company, to parties other than itself or an affiliated company for the acquisition of helium in the natural gas, as defined herein, or for any interest in such helium. Any such payment to qualify for inclusion hereunder shall be made only with the consent of Buyer; and for the purposes of this paragraph 7.4 Buyer shall be deemed to have consented to any and all such payments in satisfaction or settlement of any claims to helium in the natural gas, as defined herein, or to any interest in such helium that have been judicially determined in favor of any claimants by any Federal court or the highest appellate court of any state. Further, Buyer shall be deemed to have consented to any and all such payments under circumstances similar to any such judicially determined claim if such payments are made generally in accordance with the findings, principles, and conclusions of any such judicial determination. The amounts that Buyer shall be required to pay to Seller in accordance with this paragraph shall not include an amount to be calculated applicable to each such acquisition equal to twenty-nine (29) per cent of the weighted average of part two of the unit price or unit prices in effect during the time covered by such acquisition multiplied by the volume in MCF of helium in the natural gas, as defined herein, covered by such acquisition."

thus gave the United States the right to purchase this helium for a lower sum than, no doubt, otherwise would have been required.

5. The United States took delivery of the helium gas mixture from Phillips and transported it through its own pipeline to storage in government-owned storage facilities at Cliffside Field near Amarillo, Texas. From there it can be withdrawn as needed, and purified to grade A helium (99.995% pure helium) in government-owned plants at approximately $2.00 per m.c.f. helium.

6. Under the contracts the government agreed to take all of the helium produced up to certain amounts, and the government sold grade A helium at wholesale F.O.B. its helium plants for $35.00 per m.c.f. and has done so since the fall of 1961. All federal departments and agencies were required to purchase their helium needs from the United States at this price. The Bureau of Mines has the statutory authority and responsibility to fix the price at whatever level is necessary to pay for costs associated with the helium conservation program, including any additional payments which may be required to be paid by the United States as a result of this case.

7. Beginning in 1961, several private helium plants have been built to sell pure helium in the private commercial market. Although the government price for its helium has remained at $35.00 per m. c. f., the prices for which helium has sold on the private market from 1963 through 1972 have ranged from $35.00 to approximately $20.00 per m. c. f. Such prices are wholesale prices and the only market prices for sale of helium in the United States during the period in question.

8. The Court finds the fair and reasonable value of grade A helium during the periods here involved was $20.00 per m. c. f.

9. Recognizing the benefit to United States and the importance of paragraph 7.4 of the United States-Phillips helium contract, the Associate Solicitor of the Division of Mineral Resources of the Department of the Interior, and who approved the contract provision, correctly described it as an escalation in price:

> "This provision in effect provides for escalation in price when the cost of the raw material increases." (Pls. Ex. 39, p. 3)

10. By reason of the above escalation provision in the contract, the United States was able to obtain a base price substantially lower than would otherwise have been possible.

11. There was no known wellhead price for the helium gas in the gas stream, and it was and is impractical and uneconomical to attempt to extract the helium gas at the wellhead. This can only be done economically through large plants with large volumes of gas to process.

12. The gas stream delivered by Ashland to Phillips contained all of the natural gas liquids, such as butane, propane and pentanes plus, which Phillips extracts and did extract from the feed gas and markets these gases in liquid form. Because these rich liquids are in concentrated form (about 10% of the volume of the total feed gas stream), Phillips has been able to extract and market substantial additional quantities of such liquids, above and beyond what its existing gasoline plants would be able to extract at a substantial savings in cost. These additional liquids are in substance a byproduct of the helium plant operation.

13. Experts who testified in the trial of this case estimate that the Texas Panhandle, Southwestern Kansas and Western Oklahoma constitute 99% of the free world's

known commercial reserves of helium. This area is known as the Hugoton Field, and Ashland wells which deliver gas to Phillips are in this field.

14. To arrive at the reasonable wellhead value of Ashland's helium delivered to Phillips, there should be deducted from the value these costs incurred by Phillips in extracting and delivering the helium and also the cost of purification. In determining these costs, the total costs of the helium plant itself should be credited and reduced by a fair allocation of a portion of such costs to the incremental, or additional liquids, which the helium plant generates. This can equitably be done by calculating a fair share of the incremental benefits accruing to Phillips in its natural gas liquids operation as a direct result of the helium plant operation. Failure to assign a portion of helium plant costs to the incremental liquids operation would inequitably burden the helium plant with substantial costs which are incurred and which result in the production of the incremental liquids.

15. After allowing for the following deductions, the Court finds that the reasonable value of the helium delivered by Ashland to Phillips is shown in the following table. The deductions referred to include:

(a) All helium plant costs, including a 10% rate of return to Phillips on its stockholder equity;

(b) The incremental liquids benefit which should be applied to reduce costs of the helium plant;

(c) $2.00 per m. c. f. for purification.

16. The Court finds and is of the opinion that the following table shows the reasonable cost of extracting the helium, the reasonable value of helium on a yearly basis from the Ashland gas delivered to Phillips and further shows the volume of helium per m. c. f. extracted by

Phillips for the ten year period in question and the total value thereof; likewise it shows the interest computed at 6% per annum for the total recovery of helium delivered by Ashland and recovered by Phillips and the total amount of money judgment plaintiff is entitled to recover:

Reasonable Value Calculations

	A	B	C	D	E
	Helium Plant Costs (Plt's Ex. 61 & 62, line 10)	Liquid Benefit Credit (Plt's Ex. 61 & 62, line 12)	Net Helium Cost (Columns [a] less [b])	Minimum Value for Crude Helium $20.00 Grade A Helium Value less $2.00/mcf Purification Cost	Reasonable Value of Helium Delivered by Ashland to Phillips (Columns [d] less [c])
	SHERMAN HELIUM PLANT				
1963	$4.82	$1.01	$3.81	$18.00	$14.19
1964	$3.53	.10	3.43	18.00	14.57
1965	4.06	.27	3.79	18.00	14.21
1966	4.09	.45	3.64	18.00	14.36
1967	4.94	1.06	3.88	18.00	14.12
1968	4.22	1.16	3.06	18.00	14.94
1969	4.50	.82	3.68	18.00	14.32
1970	5.16	2.20	2.96	18.00	15.04
1971	5.31	4.29	1.02	18.00	16.98
1972	5.52	3.97	1.55	18.00	16.45
	DUMAS HELIUM PLANT				
1966	5.93	.00	5.93	18.00	12.07
1967	6.46	.78	5.68	18.00	12.32
1968	5.91	1.01	4.90	18.00	13.10
1969	6.55	.31	6.24	18.00	11.76
1970	5.89	1.04	4.85	18.00	13.15
1971	6.39	1.58	4.81	18.00	13.19

	F Vol. of Ashland Helium Extracted by Phillips (Plt's Ex. 14 & 15, Sch. 3)	G Total Reasonable Value of Ashland Helium Extracted by Phillips Awarded to Ashland	H Periods (Yrs.) at Interest to July 1, 1973	I Interest at 6% per Year	J Total Recovery By Ashland
			SHERMAN HELIUM PLANT		
	m.c.f.				
1963	7,791	$110,554.29	9½	$63,015.95	$173,570.24
1964	8,976	117,667.32	8½	60,010.33	177,677.65
1965	8,997	127,847.37	7½	57,531.32	185,378.69
1966	7,521	108,001.56	6½	42,120.61	150,122.17
1967	5,757	81,288.84	5½	26,825.32	108,114.16
1968	6,742	100,725.48	4½	27,195.88	127,921.36
1969	6,033	86,392.56	3½	18,142.44	104,535.00
1970	5,460	82,118.40	2½	12,317.76	94,436.16
1971	5,944	100,929.12	1½	9,083.62	110,012.74
1972	6,082	100,048.90	½	3,001.47	103,050.37
			DUMAS HELIUM PLANT		
1966	431	5,238.38	6½	2,042.97	7,281.35
1967	950	11,704.00	5½	3,862.32	15,566.32
1968	949	12,431.90	4½	3,356.61	15,788.51
1969	890	10,466.40	3½	2,197.94	12,664.34
1970	681	8,955.15	2½	1,343.27	10,298.42
1971	444	5,856.36	1½	527.07	6,383.43
				Total	$1,402,800.91

17. The Court finds that the attorneys for plaintiff have expended many hours prosecuting this lawsuit against the defendant and are entitled to be paid the total attorneys fees as set out below:

Jay W. Elston firm	1059 hours at $50.00	$ 52,950.00
Houston, Texas	1059 hours at $35.00	37,065.00
Gerald Sawatzky firm	550 hours at $50.00	27,500.00
Wichita, Kansas	275 hours at $35.00	9,625.00
John M. Imel firm	201.4 hours at $50.00	10,070.00
Tulsa, Oklahoma		
	Total	$137,210.00

The Court finds that the plaintiff Ashland should have judgment against the defendant Phillips for attorneys fees in the total amount of $137,210.00 for the services as above specified.

18. The Court finds that Ashland has prosecuted this lawsuit for the total helium contained in the gas stream from its respective gas wells delivered by Ashland to Phillips; that in prosecuting this lawsuit the plaintiff Ashland has incurred and paid the following expenses which are not chargeable to the defendant Phillips, but were reasonable and necessary and should be paid on the basis of one-half by Ashland and one-half by the landowners, mineral owners, otherwise royalty owners.

WITNESSES:

Leo Garwin
326 Oklahoma Mortgage Bldg.
Oklahoma City, Oklahoma

Professional Services	1969:	$ 2,810.40	
	1973:	7,260.95	$10,071.35

Troupe, Kehoe, Whiteaker
& Kent
Certified Public Accountants
2900 Power & Light Bldg.
Kansas City, Missouri

Professional Services	$24,600.00	
Travel Expenses	1,353.73	
Duplicating	425.00	$26,378.73

Tulsa Reporting Service
516 Mayo Building
Tulsa, Oklahoma

Depositions:	May, 1973	$ 277.15	
Transcript:	June, 1973	4,686.00	$ 4,963.15

Interrogs, Inc.
2439 Bank of the Southwest Bldg.
Houston, Texas 77002

Depositions:	April, 1973	$ 552.00	$ 552.00

Fulston, Siefkin, Powers &
Eberhardt
Suite 600
4th National Bank Bldg.
Wichita, Kansas

	1968	1972	1973	
Travel	$157.12		$3,028.25	
Long Distance		$6.99	239.34	
Court Reporting Depositions			2,385.30	
Postage		.98	19.21	
Duplicating			434.40	
Total	$157.12	$6.97	$6,106.50	$ 6,270.59

Martin, Logan, Moyers,
Martin & Conway
National Bank of Tulsa Bldg.
Tulsa, Oklahoma

Expenses: (7-1-69 thru 12-31-72)		
Duplicating	$ 3.90	
Long Distance	56.81	
Travel	14.40	$ 75.11

Ashland Oil, Inc.
Employee Travel Expense

	1972	1973	
Ray Althouse		$169.50	
J. C. Coogan		160.23	
B. J. White		101.02	
D. W. Cox	$179.03	405.66	
	$179.03	$836.41	$ 1,015.44

Fulbright, Crooker &
Jaworski
Bank of the Southwest Bldg.
Houston, Texas

	1966	1967	1968	1969	1970	1971	1972	1973
Long Distance	85.79	283.96	56.38	275.71	13.20	61.59	141.86	195.52
Duplicating	70.76	294.20	550.45	1,105.01	21.00	18.00	214.32	160.30
Filing Fees		25.00		15.00				
Travel		303.72	114.24	1,341.17	126.00	120.50	1,327.77	1,283.63
Printing				1,879.01	89.82			
Freight				11.30				
Secretarial				80.88			15.92	
Total	156.55	906.88	721.07	4,708.08	250.02	200.09	1,699.87	1,639.45

Total Expenses	$10,282.01	
Less Amounts Incurred in Connection with FPC Proceedings	1,922.89	$ 8,359.12
Total of all Expenses Incurred		$57,685.49

The Court finds that the Plaintiff expended $57,685.49 in the prosecution of this lawsuit which is not assessable or taxable as costs against the defendant, Phillips, and that these costs should be divided equally between plaintiff and landowners, mineral owners (hereinafter referred to as royalty owners), and from the distribution made by plaintiff, Ashland, to royalty owners first should be deducted one-half of the cost above stated as paying the cost assessable to royalty owners.

19. The Court finds from a review of the pleadings, the Complaint, Amended Complaint, Stipulation of Facts, the exhibits and testimony that Ashland has brought, prosecuted and maintained this action on its own behalf and on the behalf of the royalty owners for the delivery of helium in the entire gas stream on a per well-head basis from the inception of the production of helium to June 30, 1972. The Court takes judicial knowledge of the oil and gas leases executed by royalty owners in favor of the lessee and the assignee of the lease, and that at the time of entering into each of the respective oil and gas leases, no thought of helium rights was considered by either lessee or lessor; that no consideration passed from one to the other for any helium rights; that the helium as contained in the gas was an undealt with commodity except that the lessee had the exclusive right to enter upon the lessor's property and drill and produce gas from said premises; that the exclusive right to drill and produce gas is a perpetual right vested in the lessee so long as oil and as is produced in paying quantities from the premises by Ashland or its assigns.

The Court finds that the helium hereinabove referred to is and was the sole property of the royalty owners subject to the exclusive right of Ashland to drill and produce gas which contained helium and that their rights

are equal and that the proceeds to be derived from the sale of helium should be equally divided between Ashland and the royalty owners and therefore the judgment herein rendered in favor of the plaintiff, Ashland, and against the defendant, Phillips, should be divided equally between Ashland and the royalty owners and on the basis of the payments heretofore made by Ashland to the royalty owners for gas produced and sold to Phillips and transported in interstate commerce under the regulations of the Federal Power Commission; and that Ashland shall first deduct from the royalty owners' portion of the judgment one-half of the costs of prosecuting this action. The equal division between lessor and lessee of the proceeds from the helium is required in equity; otherwise the windfall would give ⅞ to Ashland and ⅛ to the royalty owners, which would be unconscionable and an unjust enrichment to Ashland.

Conclusions of Law

This litigation is based primarily on the 1960 Act of Congress known as the Helium Act Amendments of 1960 (50 U.S.C. § 167 et seq.) where the United States was authorized and directed to enter into a program of conservation of helium for future use.

The evidence is convincing to this Court that the United States, through the defendant, Phillips, and by reason of the Helium Act, confiscated the helium of the plaintiff and royalty owners rather than acquiring it by condemnation; nevertheless, the taking was in the nature of condemnation, and the reasonable value of the helium plus interest is proper; that the United States was obligated to pay the reasonable value of said helium in excess of $3.00 per m. c. f. which Phillips was required to pay for the helium all as provided by their contract.

The Court concludes that the law contained in Northern Natural Gas Co. v. Grounds, *supra* governs this case in the matter of reasonable value of helium and the obligation of the defendant to pay that value, and no other authorities need be cited.

Further the United States Court of Appeals for the Tenth Circuit laid down certain guidelines for trial courts in Texaco Inc. v. Phillips Petroleum Company, 481 F.2d 70 (opinion filed July 13, 1973). Here the Court said:

> "We have here another controversy over helium. The basic background is outlined in our decision in the Consolidated Helium cases. See Northern Natural Gas Company v. Grounds, * * *. We there held that lessee-producers of natural gas could recover the reasonable value of contained helium out of interpleader funds created by the government's purchases of helium from helium extraction companies and parent pipeline companies.
>
> * * *
>
> In Consolidated Helium we considered the claims of the pipelines and helium separation companies that they were entitled under their gas purchase contracts to receive the entire gas stream at the Federal Power Commission service rate and said that '*private contract law and the principles applicable thereto are not controlling.*'
>
> (Emphasis Added)
>
> * * *
>
> No good purpose would be served by repeating our analysis of the Natural Gas Act and the 1960 Helium Act amendments. We held that, * * *
>
> '* * * the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act

> to attain a symmetrical whole requires the conclusion that the FPC service rates do not apply to deny recovery for the contained helium which is processed in the separation plants.'
>
> * * *
>
> We thought that we made plain that we did not allow recovery on the application of any principles of equity, see 441 F.2d at 719-720, but on the ground that satisfactory utility regulation does not permit a utility rate to be used to obtain a commodity which is not within the contemplation of that rate.
>
> * * *
>
> We reject the defendant's assertion that Consolidated Helium was an interim decision. The Supreme Court denied certiorari, 404 U.S. 951, 92 S.Ct. 268, 30 L.Ed.2d 267, 404 U.S. 1063, 92 S.Ct. 732, 30 L.Ed.2d 751, and 404 U.S. 1065, 92 S.Ct. 732, 30 L.Ed.2d 754. The decision is final and is the law of this circuit We say nothing on plaintiff's claim that Consolidated Helium is res judicata on the issues presented here. We are concerned with jurisdiction, not with the merits.
>
> * * *
>
> In Consolidated Helium we pointed out that there are over 30,000 persons receiving income from helium bearing natural gas produced by over 500 lessee-producers under thousands of leases.
>
> * * *
>
> The problems relating to the recovery of the value of the helium content of natural gas traveling in interstate commerce have arisen because of, and under, federal statutes. Plaintiff asserts rights under those statutes and is entitled to sue in federal court. We believe the federal courts have jurisdiction under 28 U.S.C. § 1331(a)."

The Court concludes as a matter of law that the plaintiffs are entitled to a legal rate of interest because of the taking. See St. Paul Mercury Indemnity Co. v. United States, 201 F.2d 57 (C.A. 10); T. & M. Transp. Co. v. S. W. Shattuck Chemical Co., 158 F.2d 909 (C.A. 10); Louisiana & Arkansas Railway Co. v. Export Drum Co., 359 F.2d 311 (C.A. 5); Jacobs v. United States, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933).

The Court in Northern Natural Gas Company et al. v. Grounds et al., 441 F.2d 704 (10 Cir.), cert. denied, 404 U.S. 1063-1065, 92 S.Ct. 732, 30 L.Ed.2d 751, issued a post-opinion order, pertaining to costs and the mandate, recognizing the significance of the interest question. Paragraph 15 of the Order dated March 16, 1972, states:

> "The right of the lessee-producers to interest, and the amount thereof, on any sums which the District Court may adjudge to be due and owing to them shall be determined by the District Court, subject to review by this Court."

The Court concludes as a matter of law that the plaintiff's attorneys are entitled to be paid by the defendants a reasonable attorneys' fee. See United States Fidelity & Guar. Co. v. Hendry Corporation, 391 F.2d 13 (C.A. 5); Boyd Callan, Inc. v. United States, 328 F.2d 505 (C.A. 5).

In T. F. Scholes, Inc. v. United States, 295 F.2d 366 at 370 (C.A. 10) the Court said:

> "The fixing of reasonable attorneys fees rested in the sound judicial discretion of the court. . . ."

In Texas Gas Corporation v. Hankamer, 326 S.W.2d 944 (Tex.Civ.App.) it was held that gas and distillate delivered by appellees and processed in a plant was "material furnished," and an award of attorneys' fees was upheld.

The Court concludes as a matter of law that the plaintiff is entitled to judgment as follows:

(a) That plaintiff, Ashland, should have judgment against defendant, Phillips, for helium extracted for the ten-year period from 1963 to December 31, 1972, together with yearly interest thereon at the rate of 6% per annum ending June 30, 1973, in the total amount of $1,402,800.91.

(b) That plaintiff should have judgment for attorneys' fees, otherwise professional services rendered by plaintiff's attorneys in the prosecution of this action in the amount of $137,210.00.

(c) That the royalty owners should be paid one-half of the proceeds derived from the sale of helium less one-half of the expenses of $57,685.49 incurred and paid by Ashland in the prosecution of this action and not chargeable to the defendant Phillips.

(d) That the prayer of the Intervenor United States of America is denied.

An appropriate judgment will be entered as herein provided.

JUDGMENT

Based upon the Memorandum Opinion, Findings of Fact and Conclusions of Law filed herein this day, the Court enters the following judgment:

1. It is ordered, adjudged and decreed by the Court that plaintiff Ashland Oil, Inc., shall have judgment against defendant Phillips Petroleum Company in the amount of $1,402,800.91 together with accruing interest as provided by law from date of judgment, until paid, for helium sold and delivered during the ten-year period ending December 31, 1972.

2. It is further ordered, adjudged and decreed by the Court that plaintiff Ashland Oil, Inc. shall have judgment against the defendant Phillips Petroleum Company in the amount of $137,210.00 together with accruing interest as provided by law from the date of this Judgment until the Judgment is paid as reasonable attorneys' fees in the prosecution of this action.

3. It is further ordered, adjudged and decreed by the Court that Ashland Oil, Inc., on receipt of the payment of the helium together with interest thereon, as provided in item (1) above, shall deduct therefrom its expenses of prosecution in the amount of $57,685.49 and pay to its royalty owners on the basis of payments heretofore made to its royalty owners for gas sold and delivered and transported in interstate commerce one-half of said helium receipts together with its one-half of the accrued and accruing interest.

4. It is further ordered, adjudged and decreed by the Court that the defendant Phillips Petroleum Company pay the usual and ordinary costs of this litigation as provided by the Federal Rules of Civil Procedure.

5. It is further ordered, adjudged and decreed by the Court that the prayer of the Intervenor, United States of America, be, and the same is hereby denied. The defendant Phillips Petroleum Company has made no claim for relief as against the United States of America.

EXCERPTS FROM RECORD CONCERNING PLAINTIFF'S RELIANCE ON PRIOR MANDATE

PLAINTIFF'S STATEMENT OF ISSUES AND CONTENTIONS

(RII, Vol. I)

(Filed March 3, 1978)

For purposes of formulating a pretrial order, plaintiff states the following as the issues to be presented at the further hearing to be conducted as directed by the Court of Appeals, and its contentions in connection therewith:

I. WHAT WERE THE ACTUAL SALES PRICES OF PURIFIED HELIUM IN THE MARKET PLACE DURING THE PERIOD 1962 THROUGH 1972?

. . .

The present apparent attempt by defendants to present a "starting value" in the work-back formula differing from the actual selling prices of pure helium is in direct conflict with the mandate of the Court of Appeals. The $2.00 purification cost was approved for use in the formula, and that cost is appropriate only in relation to the selling price of pure helium. The Court of Appeals was advised that actual selling prices for pure helium were considerably higher than $20.00 per m.c.f. for much of the period involved. No one suggested that it had sold for less. Thus, the Court stated, 554 F.2d at 388:

> "The trial court used a figure of $20.00 per Mcf for the selling price of helium, and this was the starting figure or element of the value less expense method. This figure was testified to by the witness for the plaintiffs; this *price issue* was not met by defendant

by way of proof. On remand the validity of this figure must be examined by the trial court, and a determination made again as to the proper starting value." (Our emphasis.)

Mr. Dunn, for plaintiff, previously had testified that this figure was reasonable to use, albeit conservative, since it was the *lowest* amount pure helium had sold for during the period. As to this testimony, and testimony by defendant's experts on opinion value, the Court stated, 554 F.2d at 387:

> ". . . The plaintiffs and defendants had expert witnesses who testified as to what the value of helium should be. . . . No matter how interesting, this evidence is only opinion evidence, *and does not establish facts.* This testimony comes well down on the scale of acceptable evidence as to value. It is obvious that comparable sales or current market price is the best, and second would come the work-back method. The expert testimony of the type here presented would come somewhere after that. The experts were extremely capable, experienced persons who gave well considered and conscientious expression of their opinions, but nevertheless it remained opinion evidence on a matter of *objective facts.*" (Our emphasis).

The foregoing makes clear that the objective facts referred to, in approving the work-back method, were the actual selling prices of pure helium, and the costs of extracting and purifying it. There is no longer room in the case, under the mandate, to present any *opinion* evidence relating to value, or the starting value in the formula. These prices and costs are matters of *fact* to be established.

. . .

PRETRIAL ORDER

(RII, Vol. I)

(Filed March 31, 1978)

As the result of pretrial conferences heretofore had, whereat the plaintiff was represented by Gerald Sawatzky, Wichita, Kansas; Charles J. Woodin, Wichita, Kansas; W. O. Strong, III, Houston, Texas; Lillian Williams, Ashland Kentucky; and John M. Imel, Tulsa, Oklahoma; the defendant Phillips Petroleum Company by L. K. Smith, Tulsa, Oklahoma, and Don L. Jemison, Bartlesville, Oklahoma; and the United States of America by Andrew F. Walch, Washington, D.C.; John E. Lindskold, Washington, D.C.; and Dennis Dutterer, Washington, D.C., their attorneys of record, the following issues of fact and law were framed and exhibits identified:

I. PLAINTIFF'S CONTENTIONS

Plaintiff contends that the opinion and mandate of the Court of Appeals has finally disposed of the major issues in this case, and that, on remand, further evidence is to be received on the following limited issues:

1. What were the actual wholesale sales prices of purified helium, f.o.b. helium plants, during the years 1962 through 1972, for the purpose of fixing the starting value in applying the value-less-expense, or "workback", method of valuing the helium supplied by plaintiff for extraction in the Dumas and Sherman Helium Plants operated by defendant Phillips Petroleum Company?

Ashland contends these prices ranged from $35.00 per m.c.f. down to approximately $20.00 per m.c.f. during the years in question, and that the United States sold helium for $35.00 per m.c.f. during all years in question.

2. What is the appropriate rate of return to be allowed as a deductible cost in applying the workback method of valuation?

Ashland contends the 10% rate previously allowed is proper.

3. What is the amount of the incremental liquid gases produced as a result of the operation of the Dumas and Sherman Helium Plants, and net revenue attributable thereto, for purposes of allocating helium plant costs to the production of liquids?

Ashland contends that this Court's prior judgment on this point was correct, subject to possible modification based on further information to be supplied by Phillips.

4. Should any other element of Phillips' cost of helium extraction be re-examined? Ashland contends that re-examination is unnecessary because this Court's prior judgment utilized Phillips' recorded costs on all other elements.

5. Ashland also contends that postjudgment interest of 10% per annum should be calculated on the modified judgment to be entered herein, from the date of the first judgment.

. . .

VII. ACTION BY THE COURT

The further hearing herein shall be conducted pursuant to the opinion and mandate of the Court of Appeals.

. . .

PRETRIAL HEARING, MARCH 30, 1978

(RII, Vol. I)

. . .

Mr. Sawatzky: Well, your Honor, this goes to the whole question of Phillips' claim that the sales of crude helium somehow should constitute the starting value in the workback method.

Now the Court will recall that in the first trial this Court adopted the workback method by taking the competitive sales of pure helium in the private market. You see, it's only when pure helium is sold that it can be used beneficially in the market, government or private market.

Crude helium cannot be beneficially used. It's the raw product that has to be purified; so this Court said that the relevant fact in starting the workback method, the starting value, is the sales of pure helium for the market, the beneficial use.

The Court of Appeals in the first opinion affirmed that determination. Now in the second hearing before the Court en banc—

The Court: (Interposing) Well, this is what they said, they said simply that the Court, Trial Court's starting point may be too high or too low. Hear evidence and adjust it if necessary. That's about what they said.

Mr. Sawatzky: Well, your Honor, to give a little background which didn't appear in the opinion, it was argued by helium companies' counsel and the Government that instead of starting with the value of pure helium and its sales prices, that the Court should start with crude helium prices.

Now the Court of Appeals didn't buy that. They affirmed this Court's method of using the pure helium sales as the starting value, but they said that Phillips and the Government argued that there wasn't sufficient evidence to support our $20 figure for the sale price of the pure helium, and because they contested it there would be further evidence on it.

. . .

TRIAL PROCEEDINGS, JULY 31, 1978

(RII, Vol. 1, pp. 208 et seq.)

. . .

Mr. Sawatzky: May it please the Court, I will try not to be redundant, realizing that the Court has studied this matter thoroughly. The issues the Court has just recited, we think the Court of Appeals obviously affirmed this Court's determination that one must start this workback method or value less expense method with the market prices of Grade A helium which is the only form in which it's sold for beneficial use in a viable, competitive market. And that's why they recognized that the $2 purification cost which the government will incure to purify this crude helium delivered to it was a proper charge to be deducted from the market price of pure helium.

Now, a great deal of discovery in this action has evolved around Phillips' contention that this is not the proper approach, that you have to start with the contract price that the government paid for crude helium, which the Court of Appeals specifically threw out, or they argue in the alternative that if you isolate noncomparable spot sales and other sales of crude helium to one or two plants, somehow gave a market value to crude helium so you could start with that price. As indicated, this is not permitted under the Court of Appeals' opinion, this was recognized not only in the opinion, but Judge Doyle in his dissent said that well, he would have started with the value of the crude helium, but the majority was to the contrary. So the dissent recognized that. In the arguments on appeal in this case, which were consolidated with the Kansas cases, there was a full presentation of this crude helium issue. It was argued by Phillips that that should be the starting value in the alternative, and it was directly rejected. When Phillips and the government took petitions for Cert to the U. S. Supreme Court, the government directly recognized that that's what the Court of Appeals' holding was; you start with the value of pure helium, and Phillips in turn, also admitted that the major aspect of this Court's decision was affirmed and that certainly was a major aspect of the decision. Now, we intend, of course, to object to any evidence which departs from the Court of Appeals mandate.

. . .

The Court: While you are on your feet, Paragraph 4 of the pretrial order says, "What is the proper starting value to be used in applying the workback method of determining the reasonable value at the wellhead of the helium involved in this litigation?"

Now, when I got to studying these old matters over, I came to that paragraph and I made mention to it a while ago. Does it not enlarge the issues for this case to be tried by the operation of counsel which would modify the direction of the Tenth Circuit Court of Appeals in the matter of this case?

Mr. Sawatzky: Well, Your Honor, I don't think it's within the power of the parties to modify the issues remanded by the Court of Appeals. The Court of Appeals'

mandate, of course, governs the entire trial of the action and this Court may not depart from that mandate, no matter what anybody says. And the Court may recall that at the time of the pretrial conference—

The Court: This is what I want to get settled, what are your views on it.

Mr. Sawatzky: Well, my views are stated in my contentions in the pretrial order, where it set forth what I think are the only issues.

Now, Phillips and the government, particularly, Phillips, raised some of these other issues which would expand it and at the pretrial conference I said, "I want my position to be made entirely clear, that I am not agreeing that all these other things are issues; that if Phillips raises them, I guess they have a right to raise them, and I didn't want to go around arguing about what the issues were. I pointed out in the record, as well as in our contentions for Ashland exactly what we thought the issues were and those are stated on Pages— Well, 1 through—

The Court: Well, you are saying to the Court that Paragraph 4 of the pretrial order does not in anywise modify the duty of this Court and lessen the commands of the Tenth Circuit Court of Appeals?

Mr. Sawatzky: Oh, that's correct, Your Honor.

. . .

EXAMPLE OF PLAINTIFF'S OBJECTION TO EVIDENCE CONCERNING BASE CONTRACT PRICE

(Defendants' first Witness, Mr. Munnerlyn, RII, Vol I, at pp. 347-348)

. . .

Mr. Sawatzky: This is additionally objectionable because the Court of Appeals in a carefully-stated opinion which was rendered only after all the parties in the Kansas cases and in these cases briefed it two or three times each, and they held that the contract prices have no relevancy to determining the value of helium, and said that it bore no relationship because of this 7.4 escalation clause and this is getting into the very area where they are trying to retry the case that they have already lost and I think we are wasting the Court's time.

. . .

Supreme Court, U. S.
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No. 79-1241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ASHLAND OIL, INC.,
Petitioner,

v.

PHILLIPS PETROLEUM COMPANY

and

UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR RESPONDENT PHILLIPS PETROLEUM COMPANY IN OPPOSITION

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April 1980

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---

BRIEF FOR RESPONDENT PHILLIPS PETROLEUM COMPANY IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the court of appeals erred in deciding that the district court had not departed from a prior ruling of the court of appeals in its retrial of certain issues relating to the determination of the wellhead value of helium commingled with natural gas.

2. Whether the court of appeals erred in declining to award postjudgment interest from the date of the original district court judgment when the court of appeals had set aside that judgment and remanded for a redetermination that resulted in the entry of a very different judgment.

STATEMENT

This petition presents questions of no general importance arising out of the judgment of the Court of Appeals for the Tenth Circuit that is also the subject of respondent Phillips Petroleum Company's petition, No. 79-1250. The facts that relate generally to the litigation between Ashland Oil, Inc., petitioner here, and Phillips are fully stated in Phillips' petition. We state the facts particularly relevant to Ashland's questions briefly here.

Ashland's claim is for the value of helium commingled with combustible gas that it produced and sold to Phillips under long-term contracts. Phillips built extraction facilities pursuant to a contract with the Government and between 1962 and 1973 extracted helium from the natural gas and sold it to the Government for conservation. On a theory that is challenged in No. 79-1250, the court of appeals has held that Ashland is entitled to compensation at the wellhead for helium extracted by Phillips and sold by it to the Government in addition to what is provided for in Ashland's contracts with Phillips.

Ashland's claim was first tried in 1973. A threshold issue was whether the helium should be valued according to a so-called workback method or according to the more usual method of looking to comparable sales.

Ashland was the proponent of the workback method. It posited starting values ranging from a "high value" of $20 per mcf for Grade A (refined) helium to a "low value" of the Phillips-Government contract price for crude helium, about $11 per mcf. Phillips and the United States, which was an intervenor aligned on Phillips' side because of a potential contractual liability to indemnify Phillips, urged the traditional comparable sales method, familiar in condemnation and similar kinds of cases. They placed little or no emphasis in their evidentiary presentations on workback valuation. Most comparable sales placed a negotiated value on helium of $2 to $3 per mcf delivered at the inlet side of helium extraction plants. The trial court adopted Ashland's workback method, on the ground that there were too few comparable sales to be helpful, and worked back from Ashland's "high value" of $20 per mcf by deducting estimated costs of producing Grade A helium, thereby reaching a wellhead value ranging from $11.76 to $16.98. (Pet. App. 107a.) The trial court also awarded Ashland attorneys fees and determined that Ashland should split its recovery with its royalty owners, who were not parties to the case. (*Id.* at 118a.)

On appeal, the court of appeals en banc reversed the award of attorneys fees and the award to the royalty owners and affirmed an award of prejudgment interest. Principally, it affirmed the trial court's use of the workback method of valuation. But it was not satisfied with the way the district court had applied the method and therefore reversed the district court judgment in part and remanded for a complete revaluation. It said:

> "We set aside the value which the trial court determined by the use of the work-back method.

> On remand the trial court shall give further consideration to, and receive such evidence as may be admissible bearing on, (1) the proper starting value, (2) the amount chargeable to return on investment, (3) the expense properly allocable to production of hydrocarbons, and (4) such other matters, as are pertinent and not foreclosed herein, that bear on the determination of value by the workback method . . . ." (Pet. App. 30a.)

After petitions for certiorari filed by Phillips and the Government were denied, the case was taken up by the district court again on the remand. At a pretrial conference, the court and counsel agreed that the issue for redetermination was the reasonable value at the wellhead of helium extracted by Phillips from natural gas purchased from Ashland.[1] The method of valuation would of course be the workback method, approved on the first appeal. But the court of appeals had said that the district court on the remand should "consider whatever other elements that may be developed at further hearing, in making the value less expense or work-back determination" (*id.*), so that Phillips and the United States prepared and presented and the court entertained detailed evidence analyzing and applying the workback method.

In particular, the evidence on behalf of Phillips and the Government tended to show that the crude helium market, not the refined helium market as contended by Ashland, was the proper starting point and that the Phillips-Government contract price was an appropriate index to the fair market value for crude helium. (Pet. App. 65a, 67a-71a.) Among other things,

[1] The pretrial order appears in volume IV of the record on appeal at p. 936.

they refuted Ashland's earlier contention that the Phillips-Government contract price was not representative of the market because it was depressed on account of the presence of the indemnification clause. (*Id.* at 72a-73a.) The trial court concluded that, if the contract price deviated at all from the fair market value of crude helium, it was not too low but slightly too high. (*Id.* at 73a.) Accordingly, the court was confident of the contract price as a fair starting point.

Ashland chose to focus its evidence on the refined helium market as the starting point. As a result of extensive pretrial discussions in which Phillips and the Government fully disclosed that they expected to prove that the crude helium market and the Phillips-Government crude helium contract price were appropriate starting points, Ashland had an adequate opportunity to find and present rebuttal evidence if any existed. Not once did Ashland complain of having too little time or otherwise being constrained in responding to its adversaries' case on the proper workback starting point, either during discovery or at trial.

Also determined during the remand trial were Phillips' helium extraction costs, including operating costs, capital costs—depreciation, interest and a return element—and income taxes and certain cost allocation questions. The trial court confirmed the court of appeals' finding that significant elements of the workback method of valuation had not been sufficiently developed during the original trial. It said that "[i]n the first trial plaintiff and defendants' legal theories and approaches were sufficiently divergent to prevent a joining of issues. Consequently, crucial factual considerations were never fully developed evidentially."

(*Id.* at 63a.) On the basis of the evidence presented, the trial court arrived at a value of $3 per mcf for the commingled helium at the wellhead.

The court of appeals affirmed the major aspects of the district court judgment in a short per curiam opinion. It said that under the earlier mandate of the court of appeals en banc the trial court was "to determine a proper starting place and value" and facts related to costs and return bearing on ultimate valuation. (Pet. App. 2a.) It recognized the Phillips-Government contract price as an appropriate starting point for determining the value of helium and affirmed the trial court's wellhead valuation of $3 per mcf. (*Id.* at 2a-3a.) Because an award of prejudgment interest had been affirmed on the previous appeal, and the trial court had not included such an award in its new judgment, the court of appeals remanded to it for the ministerial act of entering a judgment that would include prejudgment interest. The court of appeals ruled that postjudgment interest should accrue from the date of the judgment on remand and not from the date of the first judgment, "in view of the extent to which the case was reversed . . . ." (*Id.* at 3a.)

ARGUMENT

Ashland presents two questions, each uniquely related to the facts of this case and each plainly within the peculiar competence of the court of appeals. Neither question presented by Ashland would be reached if the important and substantial question of law presented by Phillips in No. 79-1250 were decided in Phillips' favor. Ashland has stated no good reason why this Court should hear its questions even on the

assumption that its petition were treated as a cross-petition that assumed review of the fundamental issue posed by Phillips' petition.

1. "Law of the case" is lawyers' jargon for one aspect of a very simple idea. The idea is that, because resources including human time and energy are finite, a field once ploughed usually should not be reploughed even though the furrows are not quite straight. Specifically, in contrast to its cousin terms res judicata and collateral estoppel, which refer to successive actions, law of the case means that in a continuing case a subordinate tribunal should not depart from a rule already established in that case by a superior tribunal even though on further consideration or further evidence the rule appears dubious.[2]

No one is in nearly as good a position as the superior tribunal itself to decide whether the subordinate tribunal has been faithful to its prior rulings. In this case Ashland argued to the court of appeals ad nauseam that the district court had ignored the law of the case or, putting the same argument in other terms, had evaded the court of appeals' mandate by refining its workback valuation techniques on the retrial and, in particular, by choosing a new starting point for the application of the method. The court of appeals,

---

[2] Contrary to Ashland's assertion, the law of the case doctrine strictly does not preclude the reconsideration by the superior tribunal of its own ruling. Insurance Group Comm. v. Denver & R.G.W.R.R., 329 U.S. 607, 612 (1947), cited by Ashland for its assertion (Pet. 12 & n.5), does not stand for the erroneous proposition that an appellate court's power is so limited but only for the familiar proposition that an appellate court may refuse to reopen a ruling once made by it. *See, e.g.*, Messenger v. Anderson, 225 U.S. 436, 444 (1912).

through a panel, rejected these arguments, saying that it saw no objection to "the use of the contract value" as a starting point. (Pet. App. 2a.) The panel was of course acutely aware of what had been decided by the court en banc on the previous appeal. Judge Seth, who sat on the panel, had written the en banc opinion. Obviously the panel was cognizant of the law of the case doctrine. It directed that the case be remanded for the inclusion of prejudgment interest in the award to Ashland on the sole ground that the award of prejudgment interest was approved on the prior appeal and thus "became the law of the case." (*Id.* at 3a.) Furthermore, the other members of the court of appeals had their chance to correct any mistake in the panel's interpretation of the en banc opinion. Ashland addressed its law-of-the-case, evasion-of-the-mandate argument to the entire court in its petition for rehearing and suggestion of rehearing en banc. The response was unequivocal. The order denying the petition recited that "no member of the panel nor judge in regular active service on the Court [had] requested that the Court be polled on rehearing en banc . . . ." (Pet. App. 7a.)

A careful reading of the en banc opinion of 1977 reveals that Ashland's argument is implausible, quite apart from the fact that it has been rejected by the one tribunal in the best position to evaluate it. At the outset of its discussion of the district court's application of the workback method in the first trial, the court of appeals en banc said, after noting the trial court's $20 per mcf starting figure, "[o]n remand the validity of this figure must be examined by the trial court, and a determination made again as to the proper starting

value." (Pet. App. 21a.) And near the end of the opinion, the court said:

> "On remand the trial court shall give further consideration to, and receive such evidence as may be admissible bearing on, (1) the proper starting value . . . and (4) such other matters, as are pertinent and not foreclosed herein, that bear on the determination of value by the work-back method." (*Id.* at 30a.)

Ashland seizes on two parts of the en banc opinion as qualifying these broad and unambiguous statements. One is the court of appeals' approval of the trial court's assignment of $2 per mcf as the cost of refining Grade A helium from crude helium. (Pet. 8-9, 18 n.16; *see* Pet. App. 30a.) Ashland's chain of inference seems to be that, because refining is an expense that would not have to be accounted for in working back from a value of crude helium rather than pure helium, the court must have meant that the starting point for the workback should be the value of pure helium. Surely that is a flawed chain. Even if the district court was not bound on the remand to use pure helium value as a starting point, it was free to do so. If the court of appeals was satisfied with one element of costs that must be deducted to reach wellhead value if the district court elected to start with a pure helium price, it was appropriate for it to say so. Its saying so implies nothing as to the district court's freedom to choose another starting point. The other part of the opinion on which Ashland relies is the court's statement that "[t]he value here sought to be established is independent of the contract base amount . . . ." (Pet. 8, 18 n.16; *see* Pet. App. 23a.) That statement can be understood only in context. It was made in the last sentence of a paragraph that opened with the court's

statement of the Government's criticism that the district court's original wellhead valuation of commingled helium exceeded the base price for extracted crude helium in the Government-Phillips contract. (Pet. App. 22a.) In that long paragraph the court responded to the Government's point. In the context of its response it was appropriate for the court to note that the value sought to be established was indeed independent of a particular contractual price of extracted crude helium; it might be less or it might be more. The fact, however, that the desired wellhead value is independent of any contract price in that sense does not mean that the Phillips-Government contract price is not the best evidence of a crude helium market value from which the workback computation of the wellhead value may begin. That is what the district court decided on remand.[3]

In the court of appeals Ashland argued its law-of-the-case, evasion-of-the-mandate point as a dry question of law. It made no claim to have been surprised by what happened in the district court, much less to have been denied a fair opportunity to meet the valuation case Phillips and the Government made on remand. Only after the decision of the panel did it alter slightly the pattern of its argument. In its petition for rehear-

[3] Ashland implies that on the first appeal the basic position of Phillips and the Government was to favor a workback method starting from the contract price and that therefore the court of appeals has completely reversed itself, deciding first for Ashland and on the second appeal for Phillips and the Government. (Pet. 7-8, 16-18.) That argument is misleading. Phillips and the Government argued primarily for no liability at all and secondarily for liability related to a valuation based on comparable sales. (Pet. App. 13a-20a.) Only if they prevailed on neither of those arguments did they urge, as the least unfavorable application of the workback method that Ashland sponsored, a workback calculation that would start with the Phillips-Government contract price.

ing it made the unelaborated statement that "Ashland relied on the en banc decision on these matters on remand as being the law of the case, in presenting its evidence." It is hard to know in what relevant sense Ashland may be said to have "relied" on any en banc ruling. Ashland was fully informed, well ahead of discovery and trial, that the other parties and the court understood that more was open on the remand than it professed to believe. Ashland took the depositions of all of the remand witnesses to be presented by Phillips or the Government, including their experts. If, thereafter, Ashland chose not to contest or try to rebut their testimony as to the proper workback starting point at trial, that was a deliberate trial tactic. Ashland never complained to the trial court that it was pressed for time or otherwise lacked the opportunity to respond to the evidence. Ashland's attempt to color its case in this Court with factitious suggestions that it was deprived of a fair trial (Pet. 2, 14-15, 18) is thus without the slightest support. Its legitimate argument can only be the same dry argument it addressed to the court of appeals; it had little enough appeal there; it has none here.

2. The court of appeals, noting that Ashland had urged "that postjudgment interest commence upon the date of the first judgment and not at the end of remand trial," said that "we must hold under 28 U.S.C. § 1961, in view of the extent to which the case was reversed, 'the judgment' for the purpose of interest was that entered by the trial court on remand." (Pet. App. 3a.) It cited *Hysell* v. *Iowa Public Service Co.*, 559 F.2d 468 (8th Cir. 1977).

Ashland asserts that there is a conflict among the circuits on the question thus decided. But all that was

decided was that interest accrued from the second judgment "in view of the extent to which the case was reversed." There could be a conflict only if Ashland were able to invite our attention to another case in another circuit in which a judgment reversed to the same extent as the original judgment in this case was taken as the point for the beginning of the accrual of interest. Ashland cites no such case. The court below did not make any such hard and fast decision as Ashland implies. It did not decide that, under 28 U.S.C. § 1961, it is only the very last judgment from which interest is dated. If that had been its view, it would have specified as the critical judgment for postjudgment interest the judgment to be entered by the district court on the further ministerial remand for the inclusion in Ashland's award of prejudgment interest.

Nor has any other federal court ruled that, as a matter of law, interest begins only after the very last judgment, on the one hand, or, on the other, always begins after the first judgment, however much it may be altered in further appellate and trial litigation. It is true that some courts have allowed postjudgment interest to accrue from the time of an original trial court judgment rather than a later revised judgment on portions of the original judgment that remain intact. In cases where judgment on an item is revised and an entirely new factual determination regarding that item replaces the old judgment, however, the general rule is that the revised item bears interest only from the entry of the modified judgment. *See* Note, *Interest on Judgments in the Federal Courts,* 64 Yale L.J. 1019, 1042-43 (1955). That is this case. Where the courts of appeals have deviated from that general rule, it has been in response to particular equitable concerns in particular cases. Here the only relevant equitable

consideration, the fact that Ashland was in any event to receive prejudgment interest, militated in favor of following the general rule and treating the fundamentally revised remand judgment as the "judgment" within the meaning of Section 1961.[4]

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[4] By contrast, a concern that claims for attorneys fees "are not entitled to prejudgment interest" moved the court in Perkins v. Standard Oil Co. of Cal., 487 F.2d 672, 675 (9th Cir. 1973), one of the cases with which Ashland claims a conflict, to allow interest from first entry of judgment even though the attorneys fees were later reduced.

The other cases cited by Ashland either (1) do not involve any factual redetermination between the first judgment and the second or (2) do not arise under 28 U.S.C. § 1961 or a predecessor. In Premier Corp. v. Serrano, 471 F. Supp. 444 (S.D. Fla. 1979), the district court expressly noted that, since there were no new factual determinations in subsequent proceedings and no reversal by a court of appeals, the case was distinguishable from Hysell v. Iowa Pub. Serv. Co., 559 F.2d 468 (8th Cir. 1977), which the court cited here as authority. 471 F. Supp. at 445.

De La Rama v. De La Rama, 241 U.S. 154 (1916) (division of property in divorce), and Kneeland v. American Loan and Trust Co., 138 U.S. 509 (1891) (rental allowances in railroad foreclosure suit), did not arise under § 1961. Moreover, those cases were both affirmances of lower court decisions in which this Court simply declined to find that the lower court exceeded its discretion when it awarded postjudgment interest from the earliest trial court judgment. They confirm that the question is a discretionary judgment, based on all the relevant circumstances. Similarly, the judgment in Swartzbaugh Mfg. Co. v. United States, 289 F.2d 81 (6th Cir. 1961), based on government contract provisions and determined in the Armed Services Board of Contract Appeals, did not arise under § 1961. In that case the Sixth Circuit refused to find error in the Government's set-off of interest along with principal from the time of a contracting officer's second appraisal, subsequently revised on appeal by the Board, where the parties had failed since 1950 to resolve the matter according to the terms of their contract. In Petition of U.S. Steel Corp., 479 F.2d 489 (6th Cir.), *cert. denied,* 414 U.S. 859 (1973), a case involving seamen's personal injury claims and seamen's death claims by spouses, the Sixth Circuit awarded interest from the earliest trial judgment, relying on *Swartzbaugh* without comment or reference to § 1961.

In *Briggs* v. *Pennsylvania R.R.*, 334 U.S. 304 (1948), the issue that the dissenters asserted was left unresolved despite a conflict (Pet. 21) was the very specific issue of whether interest should run from the time of the return of a jury verdict for damages that is reinstated on appeal after a judgment n.o.v. in the trial court.[5] A decision in this case would not necessarily resolve that question.

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[5] Both Woods Explor'n & Prod. Co. v. Aluminum Co. of Am., 509 F.2d 784 (5th Cir.), *cert. denied*, 423 U.S. 833 (1975), and Givens v. Missouri-Kan.-Tex. R.R., 196 F.2d 905 (5th Cir. 1952), cited by Ashland, raise the *Briggs* issue. In each case, the court of appeals simply reversed the trial court's judgment n.o.v. and ordered that judgment be entered on the jury verdict. In those cases interest was granted from the date of judgment n.o.v. Louisiana and Ark. Ry. v. Pratt, 142 F.2d 847 (5th Cir. 1944), cited as authority in *Woods* and *Givens*, differs from those cases only in that the court of appeals awarded interest from the time of verdict instead of the time of judgment n.o.v. Apparently moved by the fact that FELA—on which the action was grounded—allowed no interest prior to verdict, the Fifth Circuit in *Pratt* reasoned that the equity of the statutory predecessor to § 1961 and the requirements of Fed. R. Civ. P. 58 that judgment on the verdict be entered forthwith by the clerk justified accrual of interest from the date of verdict.

CONCLUSION

The petition should be denied. The questions presented are insignificant ones, unlike the fundamental, threshold question presented in No. 79-1250.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1979

ASHLAND OIL, INC., PETITIONER

v.

PHILLIPS PETROLEUM COMPANY AND
UNITED STATES OF AMERICA

PHILLIPS PETROLEUM COMPANY, PETITIONER

v.

ASHLAND OIL, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONSE OF THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a)[1] is reported at 607 F. 2d 335. The opinion of the district court (Pet. App. 62a-98a) is reported at 463 F. Supp. 619. The prior opinion of the court of appeals en banc (Pet. App. 8a-42a) is reported at 554 F. 2d 381, cert. denied, 434 U.S. 921, 968. The opinion of the court of appeals

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[1]All references to "Pet. App." are to the appendix filed by petitioner Ashland.

which was withdrawn and superseded by the en banc opinion (Pet. App. 43a-59a) is not reported. The original opinion of the district court (Pet. App. 99a-118a) is reported at 364 F. Supp. 6.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4a-5a) was entered on October 15, 1979. A timely petition for rehearing was denied on November 14, 1979 (Pet. App. 6a-7a). Ashland's petition for a writ of certiorari was filed on February 11, 1980. Phillips' petition for a writ of certiorari was filed on February 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on remand, the district court violated the doctrine of the law of the case in determining the proper starting value for use in the work-back method of valuation.

2. Whether, after remand, the court of appeals erred in refusing to award postjudgment interest from the date of the original judgment, which it had set aside on a prior appeal.

3. Whether producer-sellers of natural gas containing helium are entitled to recover from their purchasers the reasonable value of the helium commingled at the wellhead in addition to the contract price.

STATEMENT

1. Helium is a non-combustible gaseous element that is found in nature intermixed with natural gas. Before 1960 helium was customarily wasted into the atmosphere when natural gas was consumed as fuel; sellers of helium-bearing natural gas customarily sought no separate price for the helium content, considering it to have little or no

value. In 1960 Congress enacted a helium conservation program. Under that program the government contracted with certain companies that agreed to extract helium from natural gas they had acquired and to sell it to the government. The United States agreed to indemnify the companies, above a specified amount, if they were adjudged liable to pay for the helium in addition to payments made under their natural gas contracts.

Ashland, a producer-seller of helium-bearing natural gas, brought this action against Phillips, a buyer of the gas and one of the companies with which the government had contracted, to recover, in addition to the contract price that Phillips had already paid, the reasonable value of the helium contained in the natural gas stream at the wellhead. The government intervened because of its potential liability under the indemnification clause of its contract with Phillips, which provided that the government would pay Phillips, in addition to the base contract price, any amount in excess of about $3.00 per Mcf that Phillips might be required to pay third parties for the helium. Pet. App. 103a.

2. At the first trial of this case, the district court, relying on *Northern Natural Gas Co.* v. *Grounds*, 441 F. 2d 704 (10th Cir.), cert. denied, 404 U.S. 951 (1971), 1063 (1972),[2] held that Ashland was entitled to recover from

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[2]Six of the eight actions which were consolidated for trial in *Grounds* were interpleader actions brought by purchasers of natural gas and sellers of helium other than Phillips to determine the proper distribution of the money paid and to be paid by the United States for the helium. 441 F. 2d at 707, 715. The remaining two actions were class actions on behalf of owner-lessors of the land from which the natural gas was extracted against the United States, in which the United States joined Phillips as a third-party defendant (Phillips was also brought in as a lessee-producer in two of the interpleader actions, but it denied any interest in the fund). 441 F. 2d at 707, 715-716. While the *Grounds* court affirmed the dismissal of the

Phillips the reasonable value at the wellhead of the helium contained in the natural gas stream sold by Ashland to Phillips. Pet. App. 113a. In computing that value, the court employed the "work-back" or "value-less-expense" method, whereby the first known market value of a previously commingled commodity is reduced by the expenses of extracting it, including a fair return to the extractor, in order to reach the value of the commodity prior to extraction. Ashland Pet. 6. In order to fix the starting point, the district judge disregarded the $10.30 per Mcf (thousand cubic feet) contract price between Phillips and the United States because, he found, that price was substantially lower than it would have been had the United States not agreed also to indemnify Phillips for any amounts in excess of about $3.00 which it was required to pay for the helium. Pet. App. 105a. Instead, the court adopted as a starting point the figure of $20.00 per Mcf, which it found to be the fair and reasonable value of Grade A refined (99.9%) helium during the relevant time period. Pet. App. 104a. The court then reduced that figure by Phillips' helium plant costs, including a 10% rate of return to Phillips on its stockholder equity, and by $2.00 per Mcf for purification, and increased it by the value of the natural gas liquids which accrued to Phillips as byproducts of the helium plant operation, to reach a value for commingled helium at the wellhead of from $11.76 to $16.98 per Mcf during the 1963-1972 period. Pet. App. 106a. Judgment in the

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landowners' actions against the United States (441 F. 2d at 715), it held that the lessee-producers were entitled to recover from their purchasers the reasonable value of the commingled helium at the wellhead (441 F. 2d at 723).

This Court denied the petitions for a writ of certiorari filed by the extracting companies (404 U.S. 1063) and the landowners (404 U.S. 951).

amount of $1,402,800.91, including prejudgment interest, and an award of attorney's fees was entered in August, 1973. Pet. App. 117a-118a.

On appeal, a panel of the Court of Appeals for the Tenth Circuit affirmed the district court's determination of liability, employment of the work-back method, and ultimate valuation of the commingled helium at the wellhead. Pet. App. 43a-61a.[3] Thereafter, the opinion of the panel was withdrawn and rehearing en banc was granted.[4]

The en banc court of appeals, as had the panel, affirmed the district court's determination of liability, the work-back method of valuation, and the deduction therein of $2.00 for the treatment of crude helium. Pet. App. 12a-21a.[5] The en banc court, however, set aside the ultimate value which the trial court had reached by the

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[3]The panel reversed the district court's award to Ashland of attorney's fees and its award of one-half of the recovery to Ashland's lessor (from whom Ashland leased the land from which it extracted the natural gas), holding that the proceeds should be divided between lessor and lessee in accordance with the provisions of the lease between them.

[4]The present case was consolidated for en banc hearing with the appeal from *Northern Natural Gas Co.* v. *Grounds*, 393 F. Supp. 949 (D. Kan. 1974), in which, on remand by the Tenth Circuit for a determination of damages, the district court found that the reasonable value of the helium component of the natural gas at the point it was delivered by the lessee-producers was between 60 and 70 cents per Mcf. 393 F. Supp. at 984. *Grounds* was not considered in the en banc opinion rendered in this case, however, and, to date, no decision has been rendered by the court of appeals in *Grounds*.

[5]The en banc court also affirmed the award of prejudgment interest. As had the panel, it reversed the district court's award of attorney's fees and its division of the recovery equally between lessor and lessee.

use of the work-back method for the trial court's further consideration and admission of evidence on

> (1) *the proper starting value*, (2) the amount chargeable to return on investment, (3) the expense properly allocable to production of hydrocarbons, and (4) such other matters, as are pertinent and not foreclosed herein, that bear on the determination of value by the work-back method.

Pet. App. 30a (emphasis added). With respect to the trial court's use of $20.00 per Mcf for the starting figure, the en banc court expressly directed that "[o]n remand the validity of this figure must be examined by the trial court, and a determination made again as to the proper starting value." Pet. App. 21a.

The United States and Phillips each filed a petition for a writ of certiorari, seeking this Court's review, *inter alia*, of the Tenth Circuit's holding that producer-sellers of helium-bearing natural gas were entitled to recover from their purchasers additional compensation for the helium contained in the gas sold. Both petitions were denied. 434 U.S. 921, 968 (1977).

3. On remand, the district court again employed the work-back method of valuation. In doing so, however, it rejected refined helium prices as a starting point, in view of expert testimony that the selected starting point should be as close as possible to the production stage in question (in this case, the helium as commingled with other natural gases at the wellhead), and on the basis of a finding that monopolistic market conditions prevented Grade A refined helium prices from reflecting the product's fair market value. Pet. App. 65a-69a. Finding the crude helium market significantly more competitive than the Grade A market, the district court examined crude helium

prices, including, but not limited to, the United States–Phillips contract price,[6] in comparison with Phillips' actual costs (which, in some cases, had been recomputed in accordance with the directions of the en banc court of appeals) to work back to a value for commingled helium at the wellhead of between $2.50 and $5.50 per Mcf, from which the district court chose $3.00 per Mcf as a single uniform value. Pet. App. 69a-79a. Accordingly, on December 28, 1978, the district court awarded Ashland $218,244 plus interest from that date. Pet. App. 97a-98a.

On appeal, a panel of the Tenth Circuit, noting that the trial court, on remand, "was to determine a proper starting place and value for [the work-back method] * * *" (Pet. App. 2a), affirmed the $3.00 value reached by the district court for the commingled helium at the wellhead. Pet. App. 2a-3a. It reversed the trial court's deletion of prejudgment interest, however, on the ground that the award of prejudgment interest had been approved on the previous appeal, was not in the remand and had become the law of the case. Pet. App. 3a. Finally, the court of appeals denied Ashland's claim for postjudgment interest commencing on the date of the first judgment, rather than at the end of the remand trial, "in view of the extent to which the case was reversed." *Ibid.* Ashland's petition for rehearing and suggestion for rehearing en banc were denied. Pet. App. 6a-7a.

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[6] On remand, the district court also found that Phillips' contract price "represented a fundamentally fair and reasonable price for crude helium" (Pet. App. 71a), which had not been depressed by the inclusion in the contract of the provision for indemnification by the government. Pet. App. 72a-73a.

DISCUSSION

1. Insofar as Ashland challenges the rulings of the court of appeals on valuation and interest, we submit there is no question warranting review by this Court.

a. Ashland contends (Ashland Pet. 12-20) that both the district court and the court of appeals violated the doctrine of the law of the case by holding, after remand, that the value of the commingled helium at the wellhead was $3.00 per Mcf. The short answer to this contention is that the court of appeals did not agree with Ashland that its own prior en banc mandate had been violated by the district court on remand.[7] Indeed, the order denying Ashland's petition for rehearing and suggestion for rehearing en banc recited that "*no member* of the panel nor judge in regular active service on the Court [had] requested that the Court be polled on rehearing en banc." Pet. App. 7a (emphasis added).

Moreover, a comparison between the opinion for the en banc court of appeals and the district court's holding on remand makes clear that the district court in no way contradicted the mandate of the appellate court. The court of appeals did not issue a remand limited solely to "providing documentation concerning the selling price of [Grade A refined] helium." Ashland Pet. 16. Rather, by directing that "[o]n remand the validity of this figure [the $20 refined helium selling price] must be examined by the trial court, and a determination made again as to the proper starting value" for employment of the work-back method (Pet. App. 21a), the court of appeals clearly allowed for the trial court's outright rejection of the

[7]The court of appeals obviously had the doctrine of the law of the case in mind when it rendered the decision in this case, since it reversed the district court's withdrawal of prejudgment interest on that very ground. Pet. App. 3a.

Grade A refined helium prices as the proper starting value.

Nor did the court of appeals eliminate the possibility that the value of the commingled helium at the wellhead might be the same as the Phillips—United States contract price: "[t]his [the contract] payment was not *necessarily* the 'price' of the helium as other considerations were present." Pet. App. 22a (emphasis added). Thus, the appellate court instructed the trial court that the value sought was not the contract price per se. In compliance with the en banc court's instructions, the district court, on remand, considered a range of values in the crude helium market, included in which was the Phillips—United States contract price, in working back to the $3.00 per Mcf value for the helium commingled at the wellhead.

b. Ashland also contends (Ashland Pet. 21-26) that the court of appeals' holding that postjudgment interest accrues from the date of the judgment on remand, rather than from the date of the original judgment, presents a conflict with the decisions of other circuits. While the circuits may be in disagreement regarding some aspect of the computation of postjudgment interest under 28 U.S.C. 1961, no such conflict is presented by the facts of the instant case.

On the first appeal of this case, the court of appeals *set aside* the district court's award of $1,402,800.91 as the valuation of helium extracted from 1963 through 1972 plus interest thereon and remanded the case for further hearing on matters bearing on the valuation issue. The court of appeals also reversed the district court's $137,210.00 award of attorney's fees and its award of one-half of the recovery to the lessors. On remand, the district court entered judgment in the amount of $218,244.00 (which was increased on appeal by the addition of

prejudgment interest) and awarded interest from the date of that judgment. The court of appeals affirmed, holding that "under 28 U.S.C. §1961, in view of the extent to which the case was reversed, 'the judgment' for the purpose of interest was that entered by the trial court on remand. *See* Hysell v. Iowa Public Service Co., 559 F. 2d 468 (8th Cir.)." Pet. App. 3a.

The court of appeals was correct in relying on *Hysell* v. *Iowa Public Service Co.*, 559 F. 2d 468 (8th Cir. 1977), in which the Eighth Circuit held that postjudgment interest would be computed not from the date of the first judgment, which had been "expressly vacated on appeal as legally insufficient" (559 F. 2d at 476), but rather from the date of the judgment on remand (which, in *Hysell*, was the same amount as had been awarded initially).

The cases relied on by Ashland are wide of the mark because they do not involve an appellate court's setting aside, or vacating, a judgment and remanding for redetermination of it. The issue presented to, but not decided by, this Court in *Briggs* v. *Pennsylvania R.R.*, 334 U.S. 304 (1948), was whether, upon reversal of a judgment n.o.v., post-judgment interest accrued from the date of the original jury verdict or from the reinstatement thereof on remand. *Louisiana & Ark. Ry.* v. *Pratt*, 142 F. 2d 847 (5th Cir. 1944), *Givens* v. *Missouri-Kan.-Tex. R.R. of Texas*, 196 F. 2d 905 (5th Cir. 1952), and *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 509 F. 2d 784 (5th Cir.), cert. denied, 423 U.S. 833 (1975), also relied on by Ashland, merely answered that question, holding that, in the case of reversal of a

judgment n.o.v., postjudgment interest accrued from the date of the original verdict.[8]

In *Perkins* v. *Standard Oil Company of California*, 487 F. 2d 672 (9th Cir. 1973), on which Ashland also relies, the court of appeals itself reduced the judgment awarded by the district court to a specific amount, thereby, in effect, affirming that part of the final judgment which the district court had awarded.[9]

These distinctions are not mere matters of form, as Ashland asserts (Ashland Pet. 24). It is one thing to recognize interest as accruing from the initial entry of a judgment on a jury verdict which, although set aside, is ultimately reinstated in full on the same grounds on which it was originally entered, or from the entry of a judgment, a part of which, at least, is, in effect, subsequently affirmed. It is a wholly different issue, however, whether to permit the accrual of interest from the entry of a

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[8] In *Briggs* v. *Pennsylvania R.R.*, 164 F. 2d 21 (2d Cir. 1947), the Second Circuit had held that where a judgment n.o.v. is reversed on appeal, postjudgment interest accrues only from the verdict on remand, which holding was not disturbed by this Court's decision in that case. While there thus may be a conflict among the circuits as to when postjudgment interest accrues in the case of reversal of a judgment n.o.v., that is not the present case.

[9] *Premier Corp.* v. *Serrano*, 471 F. Supp. 444 (S.D. Fla. 1979), which followed *Perkins, supra*, involved the additional fact that the court of appeals that vacated the judgment of the trial court "retain[ed] jurisdiction for the purpose of reviewing [the district court's] entrance of findings of fact and conclusions of law * * *." 471 F. Supp. at 445.

Of the remaining cases relied on by Ashland, *Swartzbaugh Manufacturing Co.* v. *United States*, 289 F. 2d 81 (6th Cir. 1961), was not a decision under 28 U.S.C. 1961, and the issue in *In re United States Steel Corporation*, 476 F. 2d 489 (6th Cir.), cert. denied, 414 U.S. 859 (1973), was decided solely on the basis of *Swartzbaugh*, with no mention of Section 1961.

judgment which is set aside on appeal on a ground which has the potential of eliminating any award of damages on remand (for example, in the present case, if, on remand, the district court had determined that the fair market value of crude helium was less than Phillips' costs of extraction). In light of those material distinctions, this case presents a conflict neither with previous decisions of this Court nor with the decisions of the other courts of appeals.

2. In our view, Phillips' petition presents a question more appropriate for consideration by this Court: whether the producer of natural gas is entitled to any additional recovery, over the agreed contract price, in respect of the helium contained in the stream which the purchaser extracted and sold to the government. We continue to believe that the several decisions of the court below (in this and companion cases) on this fundamental issue are erroneous. Nor is the question without importance, considering the substantial monetary consequences for the extracting companies, and, potentially, for the United States, and the possible deterrent effect of the court of appeals ruling on the helium conservation policy. Nevertheless, on balance, we cannot say that the issue urgently calls for this Court's review.

We cannot ignore that the Court, on two recent occasions, denied petitions for a writ of certiorari presenting the issue of liability of natural gas purchasers for the helium content extracted and resold. In this very case, the petition filed by the United States, primarily tendering that question, was denied. Absent a later developing conflict of decisions or other significant intervening event, we would normally eschew a second attempt to press the same issue here. We can point to no such justification at this time.

The present judgment will have minimal financial impact on the government. To be sure, a more generous allowance to the producers in the *Grounds* case, involving very much larger volumes of helium, would subject the United States to a substantial monetary claim. But now forecasting such a result is premature. No doubt, also, the present ruling will tend to increase the price of helium to the government. But the United States is not now purchasing helium, all outstanding contracts having been terminated, and it is not known when, or whether, it will resume that practice.

Of course, the financial impact on the government itself is not the only relevant consideration. Phillips and others are exposed to large claims, and these companies, as well as potential private purchasers of helium, may be deterred from conserving helium if the judgment below stands. But, so long as the formula approved by the court of appeals permits the extracting firms to earn a fair return, it is not clear that the conservation program is imperiled. If the decision of the court of appeals in *Grounds* produces such a result, application to this Court presumably is not foreclosed. At this time, we cannot identify likely consequences of sufficient importance to overcome our reluctance to ask the Court to reconsider its decision not to entertain the case.

CONCLUSION

The petition for a writ of certiorari in No. 79-1241 should be denied. The United States neither opposes nor supports the petition in No. 79-1250.

Respectfully submitted.

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No. 79-1241

ASHLAND OIL, INC.,
Petitioner,

vs.

PHILLIPS PETROLEUM COMPANY, and
UNITED STATES OF AMERICA,
Respondents.

REPLY BRIEF OF PETITIONER

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In the Supreme Court of the United States

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No. 79-1241

ASHLAND OIL, INC.,
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REPLY BRIEF OF PETITIONER

Respondents seek to blur the clearly defined, recurring federal issues presented, by submitting a plainly erroneous analysis of the valuation decisions below. The fundamental and recurring conflict concerning the time when judgment interest should commence under 28 U.S.C. §1961 is ignored, and treated as a matter of individualized case by case discretion, which would delete from the statute its mandatory direction.

The Conflict of Decisions Under 28 U.S.C. §1961

In *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 307 (1948), certiorari had been granted to resolve a conflict between the Second Circuit case being reviewed (164 F.2d 21), and *Louisiana & A.R.Co. v. Pratt*, 142 F.2d 847 (5th Cir.). In *Pratt*, contrary to *Briggs*, judgment interest from the time of the first judgment was awarded because that was the date the correct "judgment should have been entered. . . ." This rationale was later approved by the Ninth Circuit in *Perkins v. Standard Oil Company of California*, 487 F.2d 672, in holding "that interest should run from the date of entry of the original judgment be-

cause that is the date on which the correct judgment should have been entered."

As a solution to the conflict, and to the confusion which respondents' analysis invites, the rule is "eminently sound". "Interest on Judgments in Federal Courts", 64 Yale L. J. 1019, 1040-1047. Before *Perkins* fully adopted this rule, the Ninth Circuit had skirted its edges, but had rejected its full solution, in *United States v. Hougham*, 301 F.2d 133 (9th Cir.). There, the United States had urged the same *Pratt* "equity of the statute" rule when its original judgment had been increased as a result of a later appeal. But the Court did not apply it, recognizing the "conflict between the circuits on this question."

The conflict was recognized and emphasized by Judge Jerome N. Frank, dissenting, in *Chemical Bank & Trust Co. v. Prudence-Bonds Corp.*, 213 F.2d 443, 446 (2nd Cir.), one of several pertinent cases not discussed by respondents. Judge Frank would have awarded judgment interest under the above rule, though the original judgment was revised by an increase as the result of an appeal.

However tediously respondents may seek to find small factual distinctions in the conflicting cases, it is obvious that the foregoing rule is in direct conflict with the rule applied by the Tenth Circuit below, in citing and following the rationale of *Hysell v. Iowa Public Service Co.*, 559 F.2d 468 (8th Cir.), and its kindred cases from the Second and Seventh Circuits. Each rule would require a different result if applied in this case.

Respondents' approach is merely an invitation to the continued confusion and conflict. It fails to suggest any coherent solution to the conflict; nor does it even attempt to rebut the serious inequity of the rule applied below. Respondents would have the so-called "unliquidated" nature of the amount owed as precluding judg-

ment interest from the time of the first judgment—a factor apparently adopted by the *Hysell* line of cases. Thus, any appeal from any judgment would raise "uncertainty" over the amount owing, and any appeal would, under that rationale, defer the accrual of judgment interest, and enable a defendant to profit from the use of plaintiff's money, pending disposition of one or more appeals, unless the amount was totally affirmed.

This "unliquidated amount" approach is an example of muddied thinking, a carry-over of early approaches to prejudgment interest by courts seeking escape from the early common law rejection of interest as "usury." The current diminishing effect of that archaic theory as to prejudgment interest simply emphasizes the truth that it cannot rationally be applied in the area of statutory judgment interest. If one man has the use of another's money from the time of a judgment of liability against him, why should he profit from using another's money during appeals which may require some changes in the amount? Certainly 28 U.S.C. §1961 does not require that result.[1]

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1. High interest rates and high inflation are resulting in widespread legal efforts to adapt our laws to meet obvious needs in regard to judgment interest and related factors. "Inflation Puts the Bite on the Law," National Law Journal, Vol. 2, No. 29, March 31, 1980.

The Federal Court Improvement Act of 1979, passed by the U.S. Senate in October, 1979 (S. 1477), now pending in the House, would amend 28 U.S.C. §1961 to provide a uniform, current rate of interest on all federal judgments (Title I, Part B, Sec. 211 of S. 1477), rather than applying nonuniform state rates. However, the Senate Bill would not, if enacted as law, affect the present language of 28 U.S.C. §1961 over which the existing conflict of decision has developed.

Most courts have also modified their "unliquidated" amount rule as to prejudgment interest, to allow it when the amount was ascertainable from existing data and subject to computation. Even if the "unliquidated" amount concept were to be applied in this case, it would meet that test because the price and cost calculations under the workback method were based on recorded, documented prices and costs.

One thing is beyond reasonable dispute. The time is ripe to resolve the conflict among the circuits. We suggest this case is an ideal vehicle to resolve the dispute because it does involve a modification of the amount owing as fixed by the original judgment, as a result of the later appeal. It is thus open to this Court to affirm the judgment below by adopting the *Hysell* rationale that any earlier judgment vacated on appeal must be disregarded, in determining judgment interest; or to reverse the judgment below by applying the *Perkins* rationale, that the original judgment is the time from which judgment interest should run, because that is when the correct judgment should have been entered. Or if, as respondents would have it, every case should be discretionary depending on the "extent of reversal," by ignoring the mandatory nature of Section 1961, this Court, at least, can so state, and put an end to uncertainty.

In short, the factual and legal setting of this case presents a unique opportunity to decide the existing conflict, and to set forth all needed uniform guidelines for judgment interest awards under Section 1961.[2]

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2. The opportunity is also available, if desired, to reexamine the 5-4 holding in *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948), that failure of an appellate mandate to mention judgment interest deprives a district court of power to award such interest prior to the second judgment.

The 1977 *en banc* decision below did not mention judgment interest. Neither Phillips nor the United States thought to raise that objection in the last appeal; nor did it occur to the court of appeals which rejected the interest claim on the merits.

Judge Frank, in struggling with the *Briggs* problem in his dissent in *Chemical Bank & Trust Co. v. Prudence-Bonds Corp.*, 213 F.2d 443, 445, observed that the earlier appellate mandate had not mentioned judgment interest "for the very simple reason that we did not think about it."

This silence is typical of most appeals, because the first appeal involves the merits. The statute, Section 1961, provides

(Continued on following page)

Ashland's Reliance on the Law of the Case

Respondents make a strained effort to explain away the plain holding in the 1977 *en banc* decision rejecting their contention that the base contract price should be available for use in the helium valuation method, an "explanation" which the court of appeals in 1979, of course, did not purport to make because it is marked by sophistry and evasion, and is not true. Phillips combines that approach with an erroneous view of Ashland's right to rely upon the 1977 decision in presenting its case on the limited issues remanded.

Respondents cannot so easily confuse the important and recurring federal judicial question presented, a question so direct and succinct, and so at odds with the result reached by the district court, that the court of appeals itself refused to treat it in the 1979 per curiam decision affirming the district court. The court of appeals' silence in declining to apply the law of the case, combined with its silence concerning Ashland's reliance on the 1977 holding, is mute testimony to the governing significance of this important principle of federal jurisprudence, which could

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Footnote continued—

for judgment interest, and is self-executing. There is no necessity for a money judgment to separately provide for judgment interest thereafter, and it is not any matter of concern at that point. These factors emphasize the necessity of recognizing the mandatory, self-executing, nature of 28 U.S.C. §1961, and the desirability of overruling *Briggs*, which failed to consider this critical aspect, as noted in the dissent.

The majority decision in *Briggs* has also led to error in other areas involving mandatory statutory relief, where an appellate mandate has not mentioned such relief in a remand. In *Perkins v. Standard Oil Co. of California*, 399 U.S. 222 (1970), the court of appeals had felt obliged to deny statutory attorneys' fees after a remand by this Court was silent on the right to attorneys' fees. This Court corrected the error by holding that its failure to mention the right to fees did not preclude their subsequent award, provided for by 15 U.S.C. §15.

more easily be ignored than stated, in order to arrive at a result inconsistent with it.

Phillips makes the irrelevant argument that Ashland had no right to rely on the 1977 *en banc* decision, because Ashland knew that Phillips and the United States were seeking to relitigate the prior denial of its contention that the base contract price should be used in the valuation method, and thus was not surprised, and could have chosen to relitigate the issue. This argument completely avoids the real question. The question is, did Ashland have a right to rely on the 1977 holding in its favor, despite respondents' efforts to relitigate it? If Ashland did not have that right, it means that the law of the case doctrine is meaningless because any losing party could choose to relitigate a question and force the other party to do likewise. Finality and judicial economy must then vanish into thin air, permitting a continued, time-consuming, economically devastating war of attrition, in which, as in this case, nominal winners become losers and the losers are the winners.

The same situation existed in the lower courts in *Richles v. Margolies*, 279 U.S. 218 (1929), discussed in our petition, pp. 14-15. After the first appeal, the receiver was well aware that the claimant was proceeding to obtain a state court judgment with a view to establish it as binding in the federal action, despite the appellate ruling that it would not be binding. He did not oppose the judgment because it was not, according to the appellate court, to be binding on him in federal court. Yet, if there is indeed a viable law of the case doctrine, he had a right to so rely. A party declining to relitigate what the other seeks to reopen is not merely a "deliberate trial tactic" (Phillips' Brief, p. 11), but it is a trial tactic rooted in an ap-

pellate decision which was supposed to lend finality to the issue decided.

Ashland's reliance was repeatedly stated to the district court at the pretrial conferences, and at every stage thereafter. The pretrial order required the trial to proceed under the 1977 appellate mandate. (A. 122a). Neither prior to, nor during trial, did the district court ever rule that the mandate did, or did not, decide the base contract price question adversely to respondents.

But the single dissent from the *en banc* decision had no difficulty in construing the precise holding of the court of appeals, that the valuation method was to start with the selling price of pure, commercially marketable helium, and that the base contract price had been rejected. (A. 35a-36a). This was also clear to the United States and to Phillips when they filed petitions in this Court to review the decision. The 1977 decision "affirmed the district court's approach . . . whereby the court started with a supposed market value for pure helium and deducted the costs. . . ." (U.S. Petition, No. 77-530, p. 12).

The key to the district court's ultimate finding that its 1973 decision was "erroneous" is revealed in a disturbing interchange during final arguments on November 9, 1978. After having failed to decide the impact of the appellate mandate before or during the trial, the court erroneously assumed that the 1973 documented record was not before him,[3] and forcefully indicated he preferred

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3. "Mr. Sawatzky: . . . this has been presented to the Court of Appeals before, and these documented facts, they stand out so clearly, and we didn't go into them really at the [1978] trial because they were already a matter of record, and they were the basis for the Court's decision at that time, and these were briefed very extensively in the Court of Appeals two times by all the parties.

"The Court: It's not a part of the record here, there is no evidence on it. . . ." (Tr. pp. 52-53).

to decide what ought to be done without following the dictates of an appellate court.[4]

This non-judicial stance culminated in the district court's verbatim adoption of most of respondents' requested findings on the questions they relitigated. The value of $3.00 per m.c.f., however, was lower than the lowest amount (over $4.00) conceded by Phillips under its version of the valuation method; and the court denied prejudgment interest which respondents had also conceded.

The *en banc* court, and the parties, were perfectly aware in 1977 why the court had remanded for further evidence on the "selling price" of helium, to be used as the starting value. The base contract price had been rejected as an element of the method, but respondents loudly argued there was "not an iota of evidence in the record showing any sale at $20.00 per Mcf." for pure, marketable helium. (U.S. Brief, rehearing *en banc*, p. 35; Phillips' Brief, rehearing *en banc*, p. 37). Respondents conveniently failed to tell the court they could present no contrary evidence on this point. But the *en banc* opinion permitted them this opportunity on remand[5]

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4. "The Court [addressing Ashland counsel]: . . . You made a strong argument before in '73 to me, and you sold me on it, and the evidence supported what you said. The evidence supported what I did.

"But I have my doubts as to what the evidence supports now, and how much my hands are tied by the mandate of the Circuit to me to try this case again. I am in doubt. I don't know whether I should be an independent Judge to do what I think ought to be done or try to find out what they tell me to do and do what they tell me to do. I have never been used to doing that way. I like to do what I think ought to be done in the field of law and in the field of evidence and the field of justice." (Tr. p. 45).

5. This is also demonstrated by comparing the 1975 panel decision, and the 1977 *en banc* decision on this point:

(Continued on following page)

Instead, by 1978 respondents began claiming that limited remand as their authority to reopen the entire starting value question, attempting to read out of the decision the rejection of their prior contention that the base contract price should be utilized.

The complete irony of the court of appeals' 1979 refusal to consider Ashland's "dry" argument that the law of the case was viable, and had been relied upon,[6] seems to have been lost in the passage of time since 1973. For at that time, respondent's primary evidence on value consisted of isolated, noncomparable transactions purportedly supporting a $2.00 value. Respondents gave only secondary, alternative support to use of the contract base price in the workback valuation method, because the base itself was constructed without reference to true market value and included as an element the alleged $2.00 value based on the noncomparable transactions. It was, therefore, even weaker than its primary theory.

Footnote continued—

1975: "The trial court used a figure of $20.00 per Mcf for the selling price of helium, and this was the 'value' element of the value less expense method. This figure was testified to by the witness for the plaintiffs, and the amount is well within the Bureau of Mines Yearbook figures for the several years in issue. The evidence supports this figure also, and this price issue was not directly met by defendant by way of proof." (A. 51a).

1977: "The trial court used a figure of $20.00 per Mcf for the selling price of helium, and this was the starting figure or element of the value less expense method. This figure was testified to by the witness for the plaintiff; this price issue was not met by defendant by way of proof. On remand the validity of this figure must be examined by the trial court, and a determination made again as to the proper starting value." (A. 21a).

6. The issue of reliance was basic and implicit in its entire presentation of the case in the district court and on appeal. Reliance was apparent from its appellate brief, which also specifically stressed that factor, pp. 30, 46, 48. This was reiterated in its oral argument, and in its petition for rehearing.

Because Ashland in 1978 insisted on confining the issues to those remanded, and refused to reopen and relitigate what it had won; and because the district court considered the 1973 trial record as not before it, and that its affirmed rulings were subject to reexamination, respondents ultimately prevailed on the weaker of the two valuation arguments they had made in 1973.

If these events had been merely a game of judicial chess in which rules can change in midstream, the foregoing result would only be comical. But in our real world where judgments are meant to be binding, and litigation deeply affects people's lives, what has occurred constitutes a grave injustice and exemplifies an attitude encouraging litigants to appeal, to relitigate, and to appeal again.

It is this ingrown attitude in our system which has turned the idealistic search for justice into a quagmire of nonfinality, increased litigation, heavy costs and interminable delay, in which justice is equally denied to all.

But, in final analysis, the key error in the district court decision, as well as in the per curiam affirmance, was the continued failure to recognize the effect of Ashland's justified reliance on the 1977 *en banc* decision in presenting its evidence.

This issue of reliance as it pertains to the law of the case doctrine is of crucial importance in federal jurisprudence. Surely Ashland had the right to rely on the 1977 decision despite respondents' attempt to relitigate. But if, indeed, Phillips is correct in stating that reliance is unjustified whenever a losing party chooses to relitigate, it is time for this Court to say so, in order to prevent unfair trials resulting when prevailing parties decline to relitigate

what they have won, and when district courts delay ruling on the scope of a mandate until the trial is ended.

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